SHDKT PROCEEDINGS AND ORDERS

CASE NBR: [91107390] CSY STATUS: [DECIDED]
SHORT TITLE: [Espinosa, Henry J.]
VERSUS [Florida] DATE DOCKETED: [022492]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Feb 24 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Mar 25 1992		Brief of respondent Florida in opposition filed.
4	Apr 2 1992		DISTRIBUTED. April 17, 1992
5	Jun 15 1992		REDISTRIBUTED. June 19, 1992
7	Jun 22 1992		REDISTRIBUTED. June 26, 1992
9	Jun 29 1992		Petition GRANTED. Judgment REVERSED and case REMANDED The Chief Justice and Justice White dissent and would grant certiorari and set the case down for oral argument. Dissenting opinion by Justice Scalia. Opinion per curiam.

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EDITOR'S NOTE

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ORIGINAL

NO:_____

91-7390

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

HENRY JOSE ESPINOSA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I

Whether Henry Espinosa was deprived of his rights to due process and a fair trial where the record shows that his repeated motions for severance were denied, and at a joint trial with co-defendant Beltran, Beltran's counsel was so antagonistic, that he relieved the state of much of its burden to prove the case beyond a reasonable doubt, by going beyond exculpating his own client Beltran, and viciously blaming Espinosa for the crime, to the extent that he actively and effectively prosecuted Espinosa every bit as vigorously as the prosecutor?

II

Whether the trial court failed to properly limit the aggravating circumstance of Heinous, atrocious and cruel in violation of, and in conflict with Profitt v. Florida and Maynard v. Cartwright?

III

Whether the Supreme Court of Florida improperly affirmed Espinosa's death sentence where the record showed that he was deprived of sufficient time and funds to adequately and effectively defend himself against a death sentence, in violation of all guarantees of fairness, justice and due process; and that the imposition of the death sentence deprived Espinosa of due process and equal protection while imposing a disproportional cruel and unusual punishment under the fifth, sixth, eighth and fourteenth amendments of the United States Constitution?

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PARTIES TO THE PROCEEDING

The State of Florida and two defendants were the parties in the trial court. The defendants were this petitioner, Henry Jose Espinosa and co-defendant, Mauricio Beltran.

Co-defendant Beltran has filed a petition for writ of certiorari which, to the best of the undersigned's information and belief, remains pending in this Court at this time.

By this pleading, Henry Jose Espinosa, defendant and appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida entered in this proceeding on July 11, 1991 as revised following the order denying rehearing, on November 27, 1991.

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NO:_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

HENRY JOSE ESPINOSA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

DECISIONS OF THE TRIAL AND APPELLATE COURTS

The judgment of the Supreme Court of Florida in Henry Jose Espinosa v. State of Florida, Case No. 73, 436, is reported at 589 So.2d 887 (Fla. 1991). The opinion affirms the convictions and sentences, including the death sentence imposed on Henry Jose Espinosa, with two of the Justices filing separate dissenting opinions. A copy of the opinion is included in the Appendix at the end of this petition as App. 1 to 19.

The judgment and sentence of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida convicting Mr. Espinosa and sentencing him to death was filed on November 4, 1988. A copy of the sentence is included in the Appendix as 20 to 36.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on July 11, 1991. A motion for rehearing was timely filed and was denied by order of November 27, 1991, at which time a revised version of the July 11th opinion was issued. Copies of the motion for rehearing and the order of denial are included in the Appendix as App. 37 to 61, and 62 to 63, respectively. This petition for writ of certiorari is timely filed pursuant to Rule 13.1 of the Supreme Court Rules.

The jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1257, and Rule 10.1(b) and (c) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

Capital Crimes; double jeopardy, self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

EIGHTH AMENDMENT

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments imposed.

FOURTEENTH AMENDMENT

Section One. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Nature of the Case, Course of Proceedings and Disposition in the Trial and Appellate Courts

The record reflects that on July 30, 1986 a five-count indictment was returned in Dade County, Florida charging Henry Jose Espinosa and Mauricio Beltran with first degree murder of Bernardo Rodriguez, first degree murder of Teresa Rodriguez, attempted first degree murder of Odanis Rodriguez, robbery and armed burglary. Following considerable pretrial procedural skirmishing, including repeated motions for separate trials, the two defendants were tried together from August 29 until September 7, 1988.

Motions to sever the trials were heard at least six times in the two-year period before the trial. Four times, the record reflects a clear denial and in two instances there is no record ruling, but the cases were never severed. During trial, there were repeated motions to sever and motions for mistrial based upon the defendants' antagonism. A severance was also requested for the penalty phase. The state vigorously opposed the severance motions.

The jury found Espinosa guilty of the lesser included offense of second degree murder of Bernardo Rodriguez; first degree murder of Teresa Rodriguez, attempted first degree murder of Odanis Rodriguez, the lesser included offense of grand theft and armed burglary. Beltran was found guilty of the same offenses. They were adjudged guilty.

A sentencing trial took place on September 9, 1988. The jury recommended the death penalty for Espinosa by a vote of 11 to 1, and for Beltran by a vote of 8 to 4.

On November 4, 1988 the trial judge sentenced Henry Jose Espinosa to death for the first degree murder of Teresa Rodriguez; and concurrent terms of life imprisonment for second degree murder, armed robbery and attempted first degree murder and five years for grand theft.

On direct appeal to the Supreme Court of Florida, following the timely filing of briefs, the Supreme Court heard oral argument and on July 11, 1991 issued a 20-page opinion affirming Mr. Espinosa's conviction on all counts and affirming the death sentence. Two Justices dissented.

A motion for rehearing or clarification was timely filed. On November 27, 1991 the Supreme Court of Florida issued an order denying a rehearing, but filing a revised version of the decision of July 11th. These proceedings ensue.

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The Necessary Facts

In the early morning hours of July 10, 1986 Bernardo Rodriguez was found dead on the kitchen floor of his home in Dade County, Florida having been shot and stabbed. His wife, Teresa Rodriguez was found dead on her bed, stabbed, strangled and asphyxiated with a pillow. Their eleven year old daughter Odanis had been stabbed sixteen times.

The facts, as set forth in the opinion of the Supreme Court of Florida, showed that at one time, Espinosa had been neighbors with Bernardo and Teresa Rodriguez and their daughters Odenia and Odanis. On the night of the murders, Espinosa and Beltran went to the Rodriguez home. A violent struggle ensued in the kitchen during which the Bernardo Rodriguez was stabbed and shot to death. The defendants then grabbed Teresa Rodriguez and dragged her to the master bedroom where apparently Beltran suffocated her with a pillow while Espinosa stabbed her. They then went to Odanis's room which was locked. According to the Supreme Court opinion, Espinosa lured her out by telling her that her mother wanted her. When Odanis opened the door, Beltran grabbed her while Espinosa stabbed her. The defendants then left taking some money with them. Odanis's sister Odenia, telephoned a family friend who came and took the sisters to the hospital.

Odanis, who was eleven years old at the time of the murders, testified that during the early morning hours of July 10, 1986 she was in her room and heard her mother's voice and Espinosa's voice. She recognized Espinosa's voice since he had been her neighbor. The telephone in her room rang and a man, whom she later identified as Beltran, came into her room, pulled the telephone cord from the wall, and left. Odanis opened her door and saw Espinosa holding a knife while Beltran held her mother. Her mother signalled her, so she went back into her room and locked the door. She heard her mother say, "Don't Henry, don't." Espinosa then came to her door and said that her mother wanted her. When she opened the door, Beltran grabbed her and Espinosa stabbed her. At the hospital, Odanis identified Espinosa and Beltran as the assailants from photographic lineups.

Espinosa testified that Bernardo hired him to drive trucks. On the night of the murders, he and Beltran went to the Rodriguez home to pick up the trucks. Bernardo asked them to haul marijuana. Espinosa refused. Bernardo then threatened Espinosa. Teresa came into the kitchen and pointed a gun at Espinosa. Beltran grabbed the gun and Bernardo grabbed a knife. Beltran shot Bernardo and the two of them began struggling violently. Beltran kicked and

stabbed Bernardo to death. Espinosa testified that Beltran next killed Teresa and attempted to kill Odanis. Espinosa further said that he took almost no active part in the killing with the exception of stabbing Odanis once with the intention of making Beltran think Odanis was dead so that he would leave her alone.

The court instructed the jury as to four aggravating circumstances:

> the homicide was committed while the defendant was engaged in the commission of or in the attempt to commit a burglary;
>
> the homicide was committed for the purpose of avoiding or preventing lawful arrest of effecting an escape from custody;
>
> the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person;
>
> the homicide was especially wicked, evil, atrocious or cruel.

The jury recommended the death penalty for Espinosa by an 11 to 1 vote. The judge then sentenced Espinosa to death, finding in aggravation that (1) he previously had been convicted of a violent felony; (2) the murder was committed to prevent lawful arrest; (3) the murder was committed during armed burglary; and (4) the murder was especially heinous,

atrocious or cruel. The judge found statutory mitigation of no significant criminal history and nonstatutory mitigation that Espinosa was a good man. Espinosa was additionally sentenced to life with a statutory three-year minimum for the second-degree murder, life for the attempted murder, five years for grand theft and life with three-year minimum for the armed burglary.

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I

THE SUPREME COURT OF FLORIDA IMPROPERLY AFFIRMED THE CONVICTION AND SENTENCE WHERE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING ESPINOSA'S REPEATED MOTIONS FOR SEVERANCE DUE TO THE EXTRAORDINARY DEGREE TO WHICH HE WAS PREJUDICED BY HIS CO-DEFENDANT'S IRRECONCILABLE AND ANTAGONISTIC DEFENSES, AND BY THE COURT'S REFUSAL TO ALLOW ESPINOSA TO PRESENT HIS FULL DEFENSE, IN CLEAR VIOLATION OF THE RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

When the state of Florida, or any state, decides to seek the ultimate penalty in a criminal case, then it owes the defendant the full benefit of all fundamental rights guaranteed by the state and federal constitutions.

Throughout the pretrial and trial proceedings in this case both judge and prosecutor expressed great concern for judicial economy and for the costs of this prosecution to the taxpayers of Florida. They also expressed their great concern for the victims, which is admirable, but not when it supersedes or violates the fundamental rights of the accused, as it did here.

We recognize that very serious crimes were committed here and we do not diminish the serious nature of these offenses or the lasting effect this has had on the two Rodriguez children.

But when the state decides to take a life in the name of justice, then emotion, publicity and monetary considerations must be balanced with due process requirements, and everything possible must be done to ensure that the trial is a fair one.

We believe that every defendant subject to the death penalty ought to be tried separately from any other defendant unless all defendants, the state and the court stipulate and agree to a joint trial. This may be more expensive to the taxpayers in the first instance, and it may require victims to testify more than once, but it is the only way that we who labor in the system of criminal justice can be sure that each defendant has a fair trial before being found guilty and sentenced to death.

And if this Court is not prepared to make it the law of land that every defendant facing the death penalty is entitled to a separate trial, then we present the following clear demonstration that in this one case, this particular defendant Henry Jose Espinosa did not receive a fair trial.

The foundation of the American system of criminal justice is that a defendant charged with a crime is presumed innocent until proven guilty. We thought this meant proven guilty by the state. Where is the fairness if the defendant is proven guilty by another defendant?

The state has its prosecuting attorneys. The state has its witnesses and its evidence. The state has a case to present and the jury must decide the guilt or innocence of the defendant based upon the state's case. This is the system. But this is not what Henry Espinosa faced. He had to defend himself against two prosecuting bodies, the state and Mauricio Beltran.

We ask this Court to carefully consider two dissenting opinions here. As Justice Barkett states:

> . . . In this case, the defenses and aggressive tactics of Espinosa's codefendant and his lawyer clearly met this standard, thus elevating the antagonism to a level not permitted by principles of due process . . . Even under the court's view that, in general, antagonistic defenses need not always result in severance, this case goes too far.
>
> In essence, Espinosa was fighting two adversaries as codefendant's counsel relieved the state of much of its burden of proving the state's case beyond a reasonable doubt. Codefendant's counsel went far beyond merely exculpating his client and blaming Espinosa for the crime.

And in the second dissenting opinion, Justice Kogan suggested that the Court recede from a prior case because the strong possibility always exists for jury confusicn whenever the testimony of co-defendants is inconsistent and antagonistic, as it was here.

> The purpose of a criminal trial is not to gauge defendants against each other, but to gauge their alleged crimes against the requirement of the law. Sometimes this may mean that one or more defendants will receive a harsher penalty; at others it may be more lenient. The ruling, in other words, is two-edged. It is necessary, I believe, to ensure that jurors minds are focused on the merits of the guilt or innocence of the accused, not on the antagonism disclosed in two or more codefendants' testimony.

Antagonistic Defenses

Nothing is more remarkable than the degree to which the defense of Henry Espinosa was antagonistic to that of co-defendant Mauricio Beltran. Long before the trial commenced it was apparent that Beltran would blame the homicides and the stabbing of the child solely on Espinosa, and Espinosa on Beltran. From opening statement to the conclusion of the penalty phase, Espinosa had to defend himself against not only the accusations of the State of Florida, but also those of Beltran's counsel, a second, vociferous and aggressive accuser.

The trial of Henry Espinosa was thereby pervaded with a character of unfairness which renders the trial court's failure to grant a severance a serious, prejudicial abuse of discretion. Espinosa's convictions and sentence of death should have been reversed on appeal, but were not. A petition for writ of certiorari is the appropriate remedy.

Florida Rule of Criminal Procedure 3.152(b)(1)(i) provides for severance before trial

> . . . upon a showing that such order is necessary to protect the defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of one or more of the defendants.

This rule is consistent with the minimum standards promulgated by the American Bar Association. ABA Standard for Criminal Justice 13-2.1(b) (2d Ed. 1980).

The federal standard, that a severance is compelled if the defenses are antagonistic and mutually exclusive, is best stated in United States v. Berkowitz, 662 F.2d 1127, 1134 (5th Cir., Unit B, 1981) (citations omitted):

> . . . we hold that the defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant. In such a situation, the co-defendants do indeed become the government's best witnesses against each other. Where two defendants present defenses that are antagonistic at their core, a substantial possibility exists that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty . . .

By refusing to grant a severance, the trial court forced Espinosa to stand trial before two accusers, the state and the co-defendant. There is a leading Florida case right on point, Crum v. State, 398 So.2d 810 (Fla. 1981), but the Supreme Court of Florida failed to follow its own precedent.

The Florida First District Court of Appeal in Rowe v. State, 404 So.2d 1176 (Fla. 1st DCA 1981), reached the same conclusion under similar circumstances, and in Roundtree v. State, 546 So.2d 1042 (Fla. 1989), the Supreme Court of Florida reversed a conviction and death sentence, and remanded the cause "for a new trial in which Roundtree is to be tried separately from his codefendant Brown." The facts showed that at trial both Roundtree and Brown accused each other of being solely responsible for the murder for which they were charged. The Supreme Court of Florida failed to follow this case when it affirmed Espinosa's conviction and sentence.

While it is axiomatic that no defendant is entitled to a perfect trial, it is equally clear that each defendant is entitled to fair trial, which means an independent determination by the jury of that defendant's guilt or innocence.

The record reflects that early on, Espinosa filed a motion for a separate trial from Beltran, alleging that their defenses were mutually exclusive. Beltran's counsel told the

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court that Beltran was going to testify, and that his testimony would be that Espinosa was totally responsible for the crimes charged, thus warning the trial court that Espinosa would be prosecuted not only by the state of Florida, but also by the co-defendant. A second pretrial motion for severance of defendants was filed.

At a pretrial hearing on June 10, 1987, Beltran moved for a severance because both defendants had been represented by the public defender for a period of about six months after their arrest. At that time, the state argued that the remedy was not a severance, but rather to inquire of Espinosa whether he waived the conflict. Beltran's counsel also argued antagonistic defenses, but the judge stated, emphasis added:

> I don't like to try cases separately, okay. I think it is a waste of everybody's time."

The following day, Beltran's counsel again argued antagonistic defenses and the court ruled,

> Well, I think everyone knows that antagonistic defenses in and of themselves are not a basis for a severance. In fact, most judges like to sit back and let the defense attorneys do whatever they want . . . and accuse anybody of anything they want. I don't think that the law has ever said that that is unfair to either.

Espinosa's public defender argued the federal law, that when antagonism reaches the situation where defenses are irreconcilable so that the jury has to believe one and thus reject the other, that requires a severance. The court said, emphasis added:

> . . . I don't think this Court is bound by - - I think this Court is bound by the Florida law on that particular subject and not federal law, okay? And that's the position I am going to take anyhow, okay?

The prosecutor's argument was, essentially, that avoiding inconvenience to the system was paramount to defendants' constitutional rights; that Odenia and Odanis Rodriguez would suffer trauma by having to testify at more than one trial; and that the last-tried defendant would be "randomly favor-[ed]" as a result of the advantage of knowing the state's case. Of course the state would not want a defendant to be "favored" in any way. The severance was denied.

After the trial judge determined that Espinosa specifically wanted his Assistant Public Defenders to continue to represent him, and that he specifically waived any conflict in their representation Espinosa again sought a severance on grounds that he would be prosecuted by both the state and by Beltran. And that is precisely what happened.

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Again, the court pointed out "that the State of Florida has rights also as well as the defendants * * * [and] [A]ll the case law indicates that all I have to do is assure you of a fair trial" and "There is really no basis for a motion to sever. You are talking about rights here. Nobody is talking about the rights of the witnesses and everything else, as talked about in all of the Florida cases . . . But they're also young victims" (emphasis added).

At that posture of the proceedings, the trial judge again denied the motion to sever, but entered an order, over Espinosa's objections, removing Espinosa's lawyers from the case. As a result of denying the motion to sever, Espinosa was deprived of the attorneys he wanted to represent him. In April of 1988 a new attorney was appointed.

Just prior to trial on August 29, 1988, there was another hearing on the motion for severance. Espinosa's counsel argued that Espinosa would testify and blame Beltran totally; and Beltran's counsel represented to the court that Beltran was going to testify consistent with his statement which blamed Espinosa totally. The defendants would become the best witnesses, and the most aggressive prosecutors against each other in the purest sense of mutually exclusive

and irreconcilable defenses. Nonetheless, the motion for severance was denied.

Indeed, counsels' arguments were prophetic. The very potential for prejudice argued by counsel, became reality at the trial.

Beltran's counsel repeatedly argued Espinosa's guilt to the jury. For example, during opening statement, counsel argued that when Beltran and Espinosa arrived at the Rodriguez house that night, Beltran stayed outside sitting on the doorstep and Espinosa went in. Beltran, he said, heard a commotion and went inside, where he found Bernardo Rodriguez and Espinosa fighting. While trying to separate them, Beltran was cut in the hand. Then, Teresa Rodriguez appeared and pointed a gun at Espinosa. "Henry has taken the gun away from Mrs. Rodriguez and has shot Mr. Rodriguez, okay?" after which "Henry Espinosa goes into the bedroom of the house." Beltran was physically unable to have strangled Teresa Rodriguez with the telephone cord, counsel argued, because of the deep cut in his hand.

Beltran's counsel continued to pummel Espinosa:

> Mr. Espinosa goes in, takes this woman, gets on top of her and stabs her, stabs her . . . . . she had a gash right here on her belly that [the lead investigator] could actually see her spine from there.

This was Mr. Espinosa. Mr. Beltran was not even in the bedroom.

What happens? Now, remember, Beltran doesn't know the girls. He has no beef with these people. He has no problems with these people. He has no personal problems with them, no business problems with them, nothing at all.

* * *

And as horrible as this case may be, after this little girl has been stabbed all these times,

Espinosa says: There is another one. There is another one in the bedroom.

And Mauricio told Henry: Let's get out of here, get out of here, go.

Espinosa says there was some money on top of the table. . .

* * *

He says: Take the money. He owes me that money. That's my money. That's my money. That's what Espinosa says to Beltran. Take it. He owes me that money.

* * *

. . . Mr. Beltran's mistake was not wanting to turn in Henry Espinosa because they were friends.

And what does Beltran do? He helped Espinosa throw the knife and the gun in Key Biscayne in the water.

* * *

He had nothing, nothing to do with killing these people, nothing at all.

The record reflects that Henry Espinosa was subjected to a vigorous cross examination by the state after which he was every bit as vigorously and viciously cross examined by counsel for Beltran. At that point, the prosecutors could just sit back, relax and let the co-defendant do their job for them:

Beltran's counsel accused Espinosa of involvement in cocaine and marijuana deals with Bernardo Rodriguez;

Beltran's counsel asked, "You mean to tell the jury that Mauricio Beltran who really doesn't know this Bernardo Rodriguez, he gets into a fight with Bernardo Rodriguez because the machine gun people are coming;"

"What I want to know is are you telling this jury that Mauricio Beltran gets into a violent fight with this man that he doesn't know over this marijuana that you are supposed to drive or the machine gun people . . . are coming;"

"What you are telling us here - - this is the first time you've told anyone this story, haven't you? * * * I mean other than your lawyer;"

"Now, you are telling us also that when Mauricio Beltran was in the car, he asked you specifically if there were any other children in the house? * * * He didn't know that family, did he? * * * Well, isn't it true, Mr. Espinosa, that it

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was you who went to Odenia's bedroom and tried the door? *** You never tried the door? * * * He didn't know there were other children in the house, did he? But you did, didn't you? You knew there was another girl in there, didn't you? * * * Didn't you tell him: Get the money from the table, he owes me that money? * * * You never told him that? * * * And you never tried Odenia's door? * * *"

Beltran's counsel then grilled Espinosa about whether he killed Bernardo Rodriguez and Teresa Rodriguez; whether he had had marital problems; and whether he had had a business disagreement with Bernardo; and then, about his failure to tell the police what had happened; why he did not visit Odanis in the hospital; and asked why Espinosa felt threatened by Beltran not to go to the police, but not sufficiently threatened to tell him to leave his house.

The prosecutors must have been delighted with this excellent assistance from the defense camp, but the best was yet to come. In closing argument, Beltran's counsel argued that Espinosa was involved with Bernardo Rodriguez in the dope business; he told the jury that Espinosa killed Teresa because she knew and could identify him; told the jury not to believe Espinosa; referred to Espinosa's testimony as "Amazing Stories;" said that all of the evidence points to

Espinosa, and that Espinosa had a motive; he argued again that Espinosa committed the "senseless murder" of Teresa Rodriguez so she would not identify him; he argued that Beltran had no motive, that this was a problem between drug dealers; he argued that Espinosa stopped to "take care" of the witnesses, Teresa and Odanis; and that when Espinosa stabbed Odanis, his motive was to eliminate a witness who could identify him.

After trial, defense counsel filed a motion for new trial alleging as one of the grounds, the refusal to sever.

If ever an appellate court had before it a case in which one co-defendant was the prosecution's best witness against the other, this is the case.

Federal constitutional due process principles soundly reject this method of prosecution. It creates an intolerable atmosphere of hostility which is inconsistent with the constitutional guarantees of a fair trial.

The most telling, supporting evidence of this fact is that after Espinosa spent several hours on direct and cross examination, co-defendant Beltran changed his mind and refused to testify in his own behalf, much to everyone's surprise. Obviously, the impact of Espinosa's testimony, was devastating to Beltran to the extent that he suddenly aban-

doned his previously stated intention to testify. "After seeing what goes on, it's his desire not to testify."

Espinosa was subject to constant incrimination from Beltran's counsel, including the vigorous argument and vicious cross examination outlined above.

Espinosa was denied his fundamental right to a fair trial, solely for judicial economy. As this case developed through trial, there was more than mere general antagonism among co-defendants; this was a classic case of totally mutually exclusive and irreconcilable defenses justifying a severance of defendants to ensure a fair trial.

The extent of conflict and the degree to which Espinosa was attacked by his co-defendant's counsel was extraordinary. Nothing Espinosa was able to do, or could have done, could have mustered the Herculean efforts required to avoid the inherent prejudice he suffered by virtue of this joint trial. Unless this Court is prepared to abolish altogether antagonistic defenses as a basis for severance, it must grant relief to Espinosa for the remarkable unfairness visited upon him at his joint trial. Espinosa should be granted a new trial at which he is tried alone and fairly, by a single accuser on behalf of the state alone.

Espinosa Could Not Defend Himself in a Joint Trial

If it is possible that any aspect of this case may be even more remarkable than the degree of antagonism between these defendants, then it is the trial court's ruling precluding Espinosa from presenting a critical aspect of his theory of defense. The court ruled that Espinosa could not present evidence that Beltran, also known as The Beast, had a history of violent behavior in Nicaragua, because of the prejudice which would be visited on Beltran as a result.

A key prong of Espinosa's defense at trial, was that co-defendant Mauricio Beltran, when confronted by Teresa Rodriguez holding a pointed pistol and threats by both Teresa and Bernardo Rodriguez, simply "snapped," meaning that he flew into an uncontrollable rage and proceeded by himself, to systematically and brutally murder Bernardo and Teresa, and to then savagely attempt to murder Odanis Rodriguez, their 11-year old daughter by stabbing her 16 times with a butcher knife. Evidence showed that Teresa Rodriguez was stabbed five or six times and also suffocated and strangled; Bernardo was shot with a death wound to the chest, and then stabbed repeatedly in the throat, kicked and punched.

When the trial court limited the presentation of Espinosa's "Beast" defense in opening statement, counsel

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moved for a mistrial and a severance which were denied. That ruling forced Espinosa to face trial for his life, without his complete defense. Counsel vigorously argued this again on motion for new trial:

The court refused to allow Espinosa to testify in support of his defense that Beltran went berserk and committed the killings himself, that Beltran had previously told him that while in Nicaragua, he was chief of a group called the "Vengadores," translated " Avengers;" and that as chief of this group, he was known as "La Bestia," or The Beast.

As a former member of General Somoza's internal security forces, Espinosa was well aware of the activities of the "Vengadores." Counsel proffered that in desperation, in the last days of the Nicaraguan war before the Communist Sandinistas took power, General Anastasio Somoza pardoned all convicted murderers and violent criminals, naming them the "Vengadores." This group took to the mountains and under the direction of Beltran, "La Bestia," the Beast, systematically proceeded to torture, maim and murder thousands of people.

Although they did not know each other in Nicaragua, in Miami, Beltran confided his "Vengadores" activities to Espinosa, including an incident in which after killing some

suspected Sandinistas, Beltran personally ripped out and ate the heart of one of the dead Communists.

One of the state's witnesses, Alba Lanza, was a close friend of Mauricio Beltran. On pretrial deposition, she testified that once Beltran learned that Espinosa had been arrested, Beltran blurted out to Mrs. Lanza and her son, "The Beast is in trouble."

Due to the trial court's prior rulings, counsel was precluded from asking Mrs. Lanza about this, and was precluded from calling other available witnesses who were prepared to testify about "the Beast" and his activities with the "Vengadores."

Considering the brutality of the crimes; the lack of evidence that Espinosa had problems with the Rodriguezes; the positive testimony from Odanis about what a good friend Espinosa had been to her, her sister and their parents; and by contrast, considering that Beltran had no prior relationship or friendship with them as Espinosa did, the court's refusal to allow Espinosa to develop "La Bestia" and "Vengadores" evidence, totally deprived him of the corroboration he needed the jury to hear.

It was Espinosa's contention that he had no motive whatever to commit unspeakable brutal acts on his friends; and

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that with no criminal record and no prior history of drug involvement, in fact he did not do these acts.

Espinosa testified that he witnessed Beltran commit the acts as if in a wild, animal-like rage. Yes, "The Beast [was] in trouble."

Any potential prejudice to Beltran would have been avoided by separate trials, and the serious prejudice to Espinosa would not have occurred because he would have been able to present this evidence of great probative value at trial. In considering the reasonableness of Espinosa's defense, the jury should have been allowed to consider the uncontested facts about "La Bestia," Beltran The Beast, as head of the maniacal "Vengadores" in deciding whether Beltran in fact, acted alone to commit these crimes.

The court improperly weighed the right of Espinosa to present his defense with credible testimony, against Beltran's right to be tried free of prejudice, and sided with Beltran. That decision should never have had to be made.

If the court felt that Beltran would be unduly prejudiced by admission of this evidence, rather than effectively gutting Espinosa's right to present his defense, the court should have severed the defendants and tried them separately. That way, they both would have received a fair trial. This way, no one received a fair trial.

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For all of the foregoing reasons, we implore the Court to grant the writ to the Supreme Court of Florida with instructions that the convictions be reversed and the case remanded for a new, separate and fair trial.

II

THE SUPREME COURT OF FLORIDA FAILED TO FOLLOW THIS COURT'S RULE IN PROFFITT V. FLORIDA, REAFFIRMED IN MAYNARD V. CARTWRIGHT, BY REQUIRING A LIMITING INSTRUCTION AS TO THE AGGRAVATING CIRCUMSTANCE OF ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL

The record shows that the jury was provided no guidance at all as to what might have distinguished this case from the many cases in which the death penalty is not imposed. See, Godfrey v. Georgia, 446 U.S. 420, 433, 100 S.Ct. 1759, 1767, 64 L.Ed.2d 398 (1980). In its entirety, the judge's instruction as to the aggravating circumstance of heinous, atrocious, or cruel read:

> The crime for which the defendant under consideration is to be sentenced was especially wicked, evil, atrocious, or cruel.

No further definition or explanation was provided to the jury despite the most recent instruction provided by this Court in Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) that such guidance was required under the Eighth Amendment.

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There might be a basis for the Supreme Court of Florida to rely on Smalley v. State, 546 So.2d 720 (Fla. 1989) to reject this argument but for two factors. First, Smalley incorrectly asserts that Florida juries are told of the narrowing construction described in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.denied 416 U.S. 943, 94 S.Ct. 1950, 40 LEd.2d 295 (1974) which led to this Court's ruling in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). That instruction is not given to Florida juries. Certainly it was not given to Espinosa's jury, and it has specifically been abandoned by the Supreme Court of Florida. Pope v. State, 441 So.2d 1073 (Fla. 1984), Fla.Std.Jury Inst. (Crim.)(1981). Secondly, this Court never had an opportunity to review Smalley because the Supreme Court of Florida commuted the defendant's sentence to life on grounds of proportionality. Thus, in rejecting petitioner's claim that the jury was inadequately instructed on the aggravating circumstance of heinous, atrocious, or cruel the Supreme Court of Florida relied on a case which had not been scrutinized by this Court, although the issue raised therein is one that merits such review.

Because the jury was insufficiently instructed under Maynard v. Cartwright, review by this Court is warranted as

to the aggravating circumstance of heinous, atrocious or cruel. Accordingly, the writ should issue.

III

THE SUPREME COURT OF FLORIDA UPHELD ESPINOSA'S DEATH SENTENCE WHERE THE RECORD SHOWED THAT HE WAS DEPRIVED OF SUFFICIENT TIME AND FUNDS TO ADEQUATELY AND EFFECTIVELY DEFEND HIMSELF AGAINST THE DEATH PENALTY, IN VIOLATION OF ALL GUARANTEES OF FAIRNESS, JUSTICE AND DUE PROCESS AND THAT THE DEATH SENTENCE DEPRIVED ESPINOSA OF DUE PROCESS, AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION; THE WRIT MUST ISSUE WITH INSTRUCTIONS THAT THE SENTENCE BE VACATED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS.

The Sentencing Order

By written order dated November 4, the court found the following aggravating circumstances as set forth in Florida Statutes Section 921.141(5), to apply to Henry Espinosa:

(b) defendant was previously convicted of another capital felony or felony involving the use of or threat of, violence. Under Correll, supra, the second degree murder of Bernardo Rodriguez, a contemporaneous conviction for a crime against a different victim, proves this aggravating factor beyond a reasonable doubt;

(d) defendant was engaged in, or an accomplice to, the commission of a burglary. The killing of Teresa Rodriguez during the commission of an armed burglary proves this aggravating factor beyond a reasonable doubt;

(e) defendant committed the crime for the purpose of avoiding or preventing a lawful arrest. After killing Bernardo, Teresa begged for her life, promising Espinosa, a former neighbor, that she would not call the police. The

court found that she was killed because she witnessed the attack on her husband, and could identify the defendants. Convincing evidence of this intention was the subsequent attack on Odanis Rodriguez, who was tricked out of her room so she too could be eliminated as a witness; and

(g) capital felony committed to disrupt or hinder lawful exercise of governmental function. The court recognized that this aggravating circumstance "doubled up" of (e), supra, so it was "not given any additional weight."

The Court found only one statutory and one non-statutory mitigating circumstance applicable: no significant history of prior criminal activity; and the testimony of witnesses who testified that Espinosa was a kind man (which was given "some weight."

The court found, balancing the 4 against the 2, that the magnitude of the crime and the surrounding circumstances, the sentence of death was justified.

Espinosa Was Denied Time and Money to Present Important Evidence in Mitigation

In the landmark decision of Williams v. New York, 337 U.S. 241 (1949), the Supreme Court held that a sentencing court ought to have before it all relevant information about the defendant in order to impose an appropriate sentence. In a death penalty case that principle ought to doubly apply.

The Supreme Court of Florida held in Peek v. State, 395 So.2d 492, 497 (Fla. 1981), cert. denied 451 U.S. 964, that under Florida law, the jury may consider other mitigating factors, in addition to those listed in Section 921.141(6), which the defendant proffers as a basis for a sentence less

than death. Florida's "death penalty statute does not limit consideration of mitigating circumstances to those statutorily enumerated;" and the statutory mitigating factors, "when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his . . . entitlement to a sentence less than death." Peek, supra at 497.

In McCrae v. State, 510 So.2d 874, 880 (Fla. 1987), the Supreme Court of Florida ordered a new sentencing hearing because the sentencing judge did not believe he was obliged to receive and consider evidence pertaining to non-statutory mitigating factors. And in Cooper v. Dugger, 526 So.2d 900, 902 to 903 (Fla. 1988) Justice Barkett held that where the trial judge refused to consider evidence of nonstatutory mitigating circumstances, the defendant was entitled to a new sentencing. That same result was compelled here because the court refused Espinosa an opportunity to gather, and then present such evidence.

On September 9th, a motion was filed on behalf of Espinosa for substitution of penalty phase counsel; continuance of the "death phase" for substitute counsel to prepare; and for authorization of expenses for Espinosa's family to travel from Guatemala to testify at the penalty phase.

The motion alleged that one day before, September 8th, Espinosa informed counsel that he wished to change attorneys for the penalty phase, and that Espinosa had spoken with Robert McGlassen, law professor at University of Texas Law School and director of the Texas Capital Punishment Clinic & Resource Center in Austin. Mr. McGlassen directs an office equivalent to Florida's Capital Collateral Representative.

At Espinosa's request, counsel spoke with Mr. McGlassen who said that he would personally not be able to represent Espinosa, but that on Tuesday, September 13th, he would provide the name of a skilled, experienced death phase attorney who would accept the case. The motion requested that the penalty phase be postponed.

Counsel had already agreed that released alternate jurors, or new substitute jurors could be called if necessary. The state would not be prejudiced. The motion asked the court to schedule a "report re: counsel" for September 14th when the name of substitute counsel would be available.

The motion noted that Espinosa continued to assert his total innocence, and that "in an abundance of caution and fairness, the undersigned urges the Court to grant this delay, as justifiable, to provide the defendant with effective assistance of counsel in the penalty phase."

Were Espinosa not indigent, he would be able to hire any new counsel he wanted. He should be treated no differently because he is indigent:

> He faces a decision by the advisory jury and this Court that could take his life. No consideration of judicial economy or expediency, absent some extremely compelling claim of prejudice, should take precedence over giving the defendant every chance to save his life.

The motion also recited a second highly meritorious reason for a delay in the penalty phase, which had just been discovered by counsel, that Espinosa had just admitted to counsel for the first time, that he had a history of serious physical and mental child abuse. Due to embarrassment, he did not tell counsel previously. But counsel stated in the motion that he believed strongly that this information could form the basis for substantial mitigating evidence at the penalty phase both for the jury and the court.

According to the motion, Espinosa's mother was the source of the abuse. Counsel asked for expense monies to make arrangements for the mother, two brothers and two sisters to obtain visas to travel from Guatemala City to Miami to testify as penalty phase witnesses about the alleged history of mental and physical child abuse of Henry Espinosa.

There is precedent in Dade County, Florida, for just such a delay in the penalty phase, based upon an indigent defendant's allegations of substantial mitigating evidence of a history of serious physical and mental abuse as a child. In State v. Jesse Ramirez, 85-16798A, Dade Circuit Judge Steven Robinson delayed the penalty phase of the "Duct Tape I" murder case based upon the representation of defense counsel that they had recently discovered the possibility that Ramirez had been the victim of serious abuse as a child.

Recognizing that if true, the evidence could provide substantial mitigating evidence in the death phase, Judge Robinson delayed the death phase and authorized travel expenses for indigent defendant Ramirez's counsel to fly to Colombia to interview relatives and neighbors in an attempt to develop the mitigation.

In Colombia, not only did counsel confirm what Ramirez had told them, they learned that Ramirez had been the object of torture by family members. This information was eventually admitted by Ramirez who was reluctant even facing the prospect of the death penalty, to reveal his torture as a child.

Based upon the startling new evidence, counsel requested and the court appointed child abuse psychologist experts to evaluate Ramirez and the new information and to analyze its

importance as death penalty mitigation. Not all of the information eventually developed by the Ramirez defense team was available for presentation to the jury, which voted 10 to 2 for death. Subsequently, however, when all of the information was presented to Judge Robinson, he overrode the jury recommendation and imposed a sentence of life imprisonment.

The motion next alleged that the mother and siblings were willing to come to Miami to testify about the child abuse and Espinosa's troubled family background.

The trial court was less than receptive to Espinosa's motion. Counsel asked to be heard on the motion, and the court said:

> Let me cut it, really. Your motion is of record and everybody has read it.
>
> And frankly, I am not really concerned with anything that's in that motion other than the fact that you have not asked to be relieved. You are ready to proceed.
>
> --
>
> You are well aware of my feelings in all murder cases that we go to the jury as quickly as possible on the second phase of it.

The trial judge was not amenable to appointing a death penalty expert attorney, or allowing expenses to bring the family from Guatemala, and found the very request to be a "subversion of the system"

> bringing his family from Guatemala and expending large sums of the State's money to do this and

notwithstanding your reference to a case that was heard here in Dade County, which I disagree with the rulings of the Judge 100 percent . . .

. . . I do not agree with it.

. . . I don't believe it's the law. I think it's ludicrous. I think I said ridiculous.

It's hitting at the foundations of the American justice system. There never is any finality anymore that deals with death except death itself.

Now, we have a great system in this country and I think it's being subverted and this motion is a typical example of that subversion of the system.

The court went on to state that if it granted the motion

somebody might think this is legal . . . [and] this is the way we should do things. There will never be anybody except these hard-rock specialists that's ever going to be able to try a death phase anymore.

[While the post-conviction specialists do a good job], that affects very capably a defendant going to the electric chair at the present time,"

And even though that is undermining respect of the entire criminal justice system - and I believe that in the very depths of my heart that that's exactly what it is doing, it's undermining totally our American system of justice.

And I, for one, will have nothing to do with that and rather than let you continue, because there is no question in my mind, your motion is totally denied.

Counsel implored the court for just five or ten minutes of argument, at least to make his record because the motion was filed in good faith. Counsel argued what the lawyers found out in the Ramirez case, and the trial judge said

> . . . you fail to convince me at all because I wouldn't even allow that testimony . . . and I'm not spending the money to bring witnesses from Guatemala.
>
> I am not depriving the people of the State of Florida of their hard-earned funds to do this, okay?

When counsel argued constitutional issues such as equal protection, the court said that the constitution does not provide these things; that Judge Robinson's ruling is not binding on it; and "I'm older than he is. I've got more trial experience than he has. I've been on the bench longer than he has and I don't have to go by what Judge Robinson did, okay?"

Counsel continued to argue that a solvent defendant could bring witnesses from Guatemala; if the state prosecutes an indigent, then it has to provide him all reasonable expenses and costs to help him prepare a defense. In spite of counsel's protests that he had just learned this information from Espinosa, the court said, "I scheduled this [penalty phase] hearing. I'm not going to unschedule it."

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Counsel argued that it was not until the verdict was returned two days before, that he and Espinosa began seriously discussing the death penalty phase, and that is when the history of child abuse first came out. The court said it was Espinosa's decision to wait so long to tell counsel, and that

> I'm sure Mr. and Mrs. Rodriguez and Odanis Rodriguez [the victims] are very interested in his past, okay? (R 2494).

Counsel argued that the jury should hear the evidence and could reject it if they want, but at least hear it fully. But the court said,

> I consider this totally inappropriate.
>
> I am not going to subvert justice by these seemingly [sic] arguments for justice, okay?
>
> I think it's time we started to think about the victims. The newspapers say it. Everybody says it.
>
> And I think it's about time that Criminal Court Judges in this country get up and said it themselves, including the Supreme Court of Florida and the Supreme Court of the United States.
>
> You can go just so far with technical points and then it becomes ludicrous.
>
> And then the people have no faith in the system, and when the people have no faith that's the important thing.

> Mr. Rodriguez, Mrs. Rodriguez, they become unimportant when the whole system is going down the drain by subversion and I consider this so.

The court stated that it wanted the same jury to hear the penalty phase, and that with delay, the hearing would have to be much longer to present witnesses to restate the details of the crime. The court then said that counsel did the best job for Espinosa that any lawyer could:

> And if I get reversed, that's fine. I mean, that's the way the system works. I got bosses like everybody else, but I also am entitled to my opinion and I've given it to you.

Even the prosecutor keyed in on the real issue here, and told the court that it did not have to decide whether the evidence would be appropriate, just whether a continuance should be granted when the defendant only made counsel aware of the information the day before.

Henry Espinosa was entitled to a reasonable delay, and a reasonable amount of expense monies from the state for counsel to explore the information, and if confirmed, to bring his family from Guatemala to testify. The jury did not have benefit of this substantial body of information in mitigation when it voted 11 to 1 for death. The trial judge deprived Espinosa of due process and a fair trial in refusing

to allow him to present important evidence at the death penalty phase.

Penalty Phase Instructions
Mitigating Circumstances

The court agreed to give crime committed under the influence of extreme mental or emotional disturbance and whether defendant appreciated the criminality of his conduct. But due to the denial of the request for a fair opportunity develop evidence about Espinosa's childhood abuse, without knowing what an expert ultimately would say about these factors, the defense really had little to argue in support of these factors. The court noted that Espinosa could testify about his abuse as a child, but counsel responded that without corroboration, the evidence would be limited Espinosa's self-serving statements.

Espinosa's Requested Instruction on Jury's Role Was Denied

Espinosa requested an instruction on the jury's role in sentencing citing Mann v. Dugger, 817 F.2d 1471 (11th Cir. en banc); Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1988), reh.gr.vac. 828 F.2d 1497, reh. 844 F.2d 1464 (R 145).

> . . . although its recommendation on punishment to the Court is advisory, the Court must give any such recommendation great weight and, in fact, the Court must presume a jury's recommendation correct, unless there is absolutely no reasonable basis for it. Only in a situation

> where the jury's sentence recommendation is clearly erroneous can this Court override it, and impose the alternative possible punishment.

Counsel argued that although this is not yet the law in Florida, it is the only constitutional interpretation of the jury's function in the death penalty process and therefore, it should be the law.

The Court Erred In Disallowing a Mitigation Witness

The record reflects that Espinosa was going to call as another witness in mitigation, Assistant Public Defender Diane Ward, former counsel for Espinosa, who was removed as counsel due to Beltran's complaints of conflict and prejudice. Counsel planned to admit as exhibits two pieces of handiwork which Henry Espinosa made for Diane Ward while he was in the jail.

Counsel proffered that Ms. Ward would testify that she came to know Espinosa as a kind, artistic person, and then introduce the items for the jury. Beltran's counsel complained. Because Ms. Ward had previously represented both defendants, she could not testify. Her testimony would not have related to Beltran in any way. The state took no position.

The court ruled that conflict was not a problem, but that it was "bad precedent for attorneys to . . . and to be-

come witnesses and saying how nice their client is or was." Her testimony would have been her observations as a person, not related to the case, but the court excluded her as a witness in mitigation,

> . . . on the basis that [she] was part of the defense team and I know of no situation where lawyers are allowed to come in and testify how nice their former clients were, okay?

Counsel reminded the court that this is possible mitigation in a death proceeding, and that if the jury saw Espinosa's handiwork, they might think twice about recommending the death penalty, but court ruled,

> . . . I don't propose to expand the penalty phases for now or the future every time lawyers get involved with somebody.
>
> * * *
>
> Lawyers are not in that capacity - we are not witnesses. We are advocates and I am not going to put lawyers in the position where they become anything less or more than advocates.

Beltran Blamed Espinosa Totally

Although he did not testify at the guilt-innocence phase of the trial, Beltran did testify at the sentencing phase, and admitted into evidence his 35-page statement to the police. Beltran blamed Espinosa totally for the crimes: Bernardo Rodriguez and Espinosa were fighting. Beltran tried

to separate them; Espinosa grabbed the gun from Teresa; Espinosa shot Bernardo; Beltran never went into the bedroom; Espinosa stabbed Teresa and Odanis; Espinosa told Beltran to grab the money and said that he had to kill the other child; Beltran told Espinosa he was crazy, and that Beltran was leaving, whereupon Espinosa followed him; they took the money to the Lanza's because Espinosa had no place to keep it and he told Beltran to tell Lanza that the money was a loan.

A defendant's right to an impartial jury is fundamental, and is guaranteed by the sixth and fourteenth amendments of the United States Constitution. The right to an impartial sentencing jury is further guaranteed by the eighth amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). The jury plays a critical role in the capital sentencing scheme of Florida. Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1986).

Under these facts, the jury was tainted for purposes of a fair sentencing hearing on one first degree murder charge, where it had already heard evidence about the stabbing of Odanis Rodriguez. The trial court's failure to discharge the entire panel for sentencing deprived Espinosa of his right to a fundamentally fair capital sentencing hearing.

Application of the Capital Sentencing Statute to Espinosa Violates The Eighth And Fourteenth Amendments

Under Florida law, no defendant can be sentenced to death unless the aggravating factors outweigh the mitigating factors. Alvord v. State, 322 So.2d 533, 540 (Fla. 1975). Since the aggravating circumstances set forth in Florida Statutes Section 921.141(5) actually define those capital crimes to which the death penalty is applicable, they must be proven beyond a reasonable doubt before being considered by judge or jury. State v. Dixon, 283 So.2d 1, 8 to 9 (Fla. 1973). The statutory aggravating circumstances are exclusive and no other circumstances may be used to tip the balance in favor of death. Miller v. State, 373 So.2d 882, 885 (Fla. 1979).

In imposing the death penalty on Henry Espinosa, the trial court violated these principles by relying on aggravating circumstances not established by the evidence, and by using nonstatutory aggravating factors in its weighing process. Because the trial court also found two mitigating factors, the death sentence must be vacated for a new sentencing hearing. Elledge v. State, 346 So.2d 998 (Fla. 1977).

Imposition of The Death Penalty Against Espinosa Constitutes a Disproportional and Constitutionally Impermissible Application of Capital Punishment

It is incumbent upon the Supreme Court of Florida, and now this Court, in all capital cases, to objectively review the circumstances to ascertain whether the imposition of the death penalty constitutes a proportional application of the ultimate sentence. In this case, despite the applicability of certain aggravating circumstances, to uphold the imposition of the sentence of death would be inconsistent with the penalties meted other defendants committing similar crimes under like circumstances. As such, the defendant's sentence of death cannot be sustained consistent with the promise of equal protection, due process, and freedom from cruel and unusual punishment guaranteed by the fifth, sixth, eighth and fourteenth amendments.

Florida Statutes Section 921.141(5) establishes an automatic review procedure in the Supreme Court of Florida to ensure against the disproportional application of the death penalty:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can

> review that case in the light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia . . . can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather an exercise in judgment at all. Dixon v. State, 283 So.2d 1, 10 (Fla. 1973).

Death is reserved only for the most aggravated of murders, and thus is not proportional in a case such as this. Despite the best efforts of those involved in the process, studies have shown the disproportional application of capital punishment. There are numerous examples of Florida cases which demonstrate the arbitrary and fortuitous manner in which capital prosecutions are disposed in this state.

The death penalty must be applied "fairly and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Here, it was not. The trial court found four aggravating circumstances and two mitigating circumstances. The murder of which Espinosa stands convicted is not so extraordinary as to justify the imposition of the extraordinary sentence of death. More importantly, the execution of Henry Espinosa cannot be reconciled with the prison sentences imposed by Florida courts in the cases of Robert F. Carr, Ronnie Lee Pouncy, Scott Tyrell Riles, Gary Knopf, Robert Lee Douglas, Joseph Roth, Stanley Morgan,

Preston Shands, Jr., Phillip Courtney, Dale James King and James R. Jacobs and numerous others whose offenses are no less pointless or more justifiable, but whose lives were spared. See App. 64 to 67 which is a portion of a pleading filed in the trial court, setting out each defendant's case in detail.

For all of the foregoing reasons, this Court must issue its writ, and the sentence of death imposed upon Henry Espinosa must be reversed.

Sheryl J. Lowenthal, Attorney at Law
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CONCLUSION

Based upon the foregoing arguments and citations of authority, petitioner Henry Jose Espinosa respectfully prays that this Honorable Court will issue its most gracious writ to the Supreme Court of Florida.

Respectfully submitted,

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Dated: February 21, 1992

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Supreme Court of Florida

REVISED OPINION

No. 73,436

HENRY JOSE ESPINOSA,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[July 11, 1991]

PER CURIAM.

Henry Jose Espinosa appeals to this Court to review his conviction and sentence of death for the first-degree murder of Teresa Rodriguez. Espinosa additionally appeals his convictions for the second-degree murder of Bernardo Rodriguez, the attempted murder of Odanis Rodriguez, grand theft, and burglary. We have jurisdiction pursuant to article V, section 3(b)(1), of the Florida Constitution.

Espinosa was tried together with his codefendant, Mauricio Beltran-Lopez. The state introduced evidence showing that the murders were committed in the following manner. At one time Espinosa had been neighbors with Bernardo and Teresa Rodriguez and their daughters, Odenia and Odanis. On the night of the murders, Espinosa and Beltran-Lopez went to the Rodriguezes' home. A violent struggle ensued in the kitchen during which the defendants shot and stabbed Bernardo Rodriguez to death. The defendants then grabbed Teresa Rodriguez and dragged her to the master bedroom where apparently Beltran-Lopez suffocated her with a pillow while Espinosa repeatedly stabbed her. The defendants then went to Odanis's room which was locked. Espinosa lured her out by telling her that her mother wanted her. When Odanis opened the door, Beltran-Lopez grabbed her while Espinosa repeatedly stabbed her. The defendants then left, taking some money with them. Odanis's sister, Odenia, telephoned a family friend who came and took the sisters to the hospital.

At the trial Odanis, who was eleven years old at the time of the murders, testified that during the early morning hours of July 10, 1986, she was in her room and heard her mother's and Espinosa's voices. Odanis recognized Espinosa's voice since he had been her neighbor. The telephone in her room rang and a man, whom she later identified as Beltran-Lopez, came into her room, pulled the telephone cord from the wall, and left. Odanis then

opened her door and saw Espinosa holding a knife while Beltran-Lopez held her mother. Her mother signalled her, so she went back into her room and locked the door. She then heard her mother say, "Don't, Henry, don't." Espinosa then came to her door and told her that her mother wanted her. When she opened the door, Beltran-Lopez grabbed her and Espinosa started stabbing her. Later, at the hospital, Odanis identified Espinosa and Beltran-Lopez as the assailants from photographic lineups.

Odenia, who was twelve years old at the time of the murders, testified that she had heard her mother tell Espinosa that if he would leave she would not call the police. She also heard Espinosa call Odanis out of her room. She, too, had recognized Espinosa's voice because he had been their neighbor, and she had picked his picture out of a photographic lineup.

The medical examiner testified that Bernardo had been shot once and stabbed six times. Teresa had been smothered with a pillow, stabbed six times, and strangled while she was alive. The parties stipulated that Odanis was stabbed sixteen times. A fingerprint expert testified that a bloody palm print from the refrigerator was Beltran-Lopez's and a bloody fingerprint was Espinosa's. Beltran-Lopez's bloody prints were also found on a chair cover. A serologist testified that blood consistent with Beltran-Lopez's blood, from a wound to his hand, was found in several areas of the house. The serologist also testified that blood consistent with Teresa and Odanis's blood was found spattered on a pair of shorts in Espinosa's car. A Ms. Lanza,

with whom Beltran-Lopez had been staying, testified that Beltran-Lopez and Espinosa brought a pack of money to her house after the murders and asked her to keep it for them, telling her it was a loan. Specks of blood were found on the money.

Espinosa, himself, testified at the trial that Bernardo had hired him to drive trucks. On the night of the murders, Espinosa and Beltran-Lopez went to the Rodriguezes' house to pick up the trucks. Bernardo then asked them to haul marijuana, but Espinosa refused. Bernardo then threatened Espinosa, and Teresa came out into the kitchen and pointed a gun at Espinosa. Beltran-Lopez then grabbed the gun and Bernardo grabbed a knife. Beltran-Lopez then shot Bernardo and the two of them began struggling violently. Beltran-Lopez kicked and stabbed Bernardo to death. Espinosa testified that Beltran-Lopez next killed Teresa and then attempted to kill Odanis. Espinosa further claimed to have taken almost no active part in the killing with the exception of stabbing Odanis once with the intention of making Beltran-Lopez think Odanis was dead so that he would leave her alone.

Espinosa also presented evidence at the trial that Bernardo Rodriguez was involved in drug trafficking. A police officer testified that a car parked in the Rodriguezes' driveway was registered to a Maria Castellanos. When the police went to her house in the course of the murder investigation, they seized over a thousand pounds of marijuana and some marijuana-trafficking equipment. They also found a dump truck at

Castellanos's house similar to one parked at the Rodriguezes' house. Further, a beeper found on a man who attempted to flee Castellanos's house bore the same telephone number as a beeper found in the Rodriguezes' kitchen. A fingerprint expert testified that Bernardo Rodriguez's fingerprints were found on a cigarette pack in the car and on a candleholder in Castellanos's house.

Beltran-Lopez did not testify during the guilt phase of the trial. The jury ultimately found both defendants guilty.

During the penalty phase of the trial, Espinosa presented several character witnesses who testified that he was a good person. Espinosa also made a statement on his own behalf. Beltran-Lopez also testified, stating that after he was arrested he had given a statement to the police concerning his involvement in the murders. He largely blamed the murders on Espinosa, admitting to only minimal participation. He did admit that he had stolen money from the house. Beltran-Lopez's mother testified that he was a good son.

The jury recommended the death penalty for Espinosa by an eleven-to-one vote.[1] The judge then sentenced Espinosa to death, finding in aggravation that (1) he previously had been convicted of a violent felony; (2) the murder was committed to prevent lawful arrest; (3) the murder was committed during armed

[1] The jury recommended the death penalty for Beltran-Lopez by an eight-to-four vote, and he, too, was sentenced to death.

burglary; and (4) the murder was especially heinous, atrocious, or cruel.[2] The judge found statutory mitigation of no significant criminal history and nonstatutory mitigation that Espinosa was a good man. Espinosa was additionally sentenced to life with a statutory three-year minimum for the second-degree murder, life for the attempted murder, five years for grand theft, and life with a three-year minimum for the armed burglary.

Espinosa's first claim in this appeal is that the trial court should have granted Espinosa's motion to have his trial severed from that of Beltran-Lopez. He claims that their defenses were sufficiently antagonistic so that the trial court should have granted severance under rule 3.152 of the Florida Rules of Criminal Procedure.

As this Court has previously stated:

> Rule 3.152(b)(1) directs the trial court to order severance whenever necessary "to promote a fair determination of the guilt or innocence of one or more defendants . . . ." As we stated in Menendez v. State, 368 So.2d 1278 (Fla. 1979), and in Crum v. State, 398 So.2d 810 (Fla. 1981), this rule is consistent with the American Bar Association standards relating to joinder and severance in criminal trials. The object of the rule is not to provide defendants with an absolute right, upon request, to separate trials when they blame each other for the crime. Rather, the rule is designed to

[2] § 921.141(5)(b), (d), (e), (h), Fla. Stat. (1985).

assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies o only one of several defendants. A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

In situations less obviously prejudicial than the Bruton circumstance, the question of whether severance should be granted must necessarily be answered on a case by case basis. Some general rules have, however, been established. Specifically, the fact that the defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to a severance. United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977); United States v. Perez, 489 F.2d 51 (5th Cir. 1973), cert. denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). Nor is hostility among defendants, or an attempt by one defendant to escape punishment by throwing the blame on a codefendant, a sufficient reason, by itself, to require severance. United States v. Herring, 602 F.2d 1220 (5th

Cir.), cert. denied, 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 732 (1979); United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 570 (1977); Perez; Hawkins v. State, 199 So.2d 276 (Fla. 1967), vacated on other grounds, 408 U.S. 941, 92 S.Ct. 2857, 33 L.Ed.2d 765 (1972). If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter. As in this case, the defendants are confronting each other and are subject to cross-examination upon testifying, thus affording the jury access to all relevant facts.

McCray v. State, 416 So. 2d 804, 806 (Fla. 1982) (footnotes omitted). Under this standard, Espinosa and Beltran-Lopez were clearly not entitled to separate trials. The fact that Espinosa testified at trial and was subject to examination by Beltran-Lopez's attorney is not a sufficient reason to grant severance. Further, Espinosa was not prejudiced by an inability to cross-examine Beltran-Lopez during the guilt phase since Beltran-Lopez did not testify and the state did not attempt to introduce Beltran-Lopez's confession. Beltran-Lopez did testify during the penalty phase, but Espinosa was able to cross-examine him. No evidence was introduced in this trial that could not have been introduced against either Espinosa or Beltran-Lopez if either had been tried alone. Therefore, we find that Espinosa and Beltran-Lopez were not entitled to a severance.

Espinosa additionally claims that the count charging him with the attempted murder of Odanis should have been severed from

the other counts against him. He argues that rule 3.152(a)(2)(i) provides for severance here to promote a fair determination of his guilt on each count. He argues that he could not get a fair determination by combining the counts because he did not want to testify about Odanis's stabbing and because during the penalty phase the jury could not separate the stabbing of the eleven-year-old girl from her mother's murder.

We also reject this claim. The attempted murder of Odanis was part of the same single criminal episode in which her parents were murdered and as such was properly joined with the other counts. See Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990), cert. denied, 111 S.Ct. 1339 (1991). The facts surrounding Odanis's attempted murder, Odanis's testimony recounting the events of that night, and her ability to identify Espinosa and Beltran-Lopez were an integral part of the prosecution's case concerning her parents' murders.

Espinosa next claims that the trial court should have allowed him to introduce evidence that Beltran-Lopez had a history of violent behavior when he lived in Nicaragua. Espinosa argues that this would have supported his defense that Beltran-Lopez flew into a rage during an argument with Bernardo Rodriguez and killed the Rodriguezes. Espinosa also argues that he should have been allowed to introduce evidence of Bernardo Rodriguez's conviction for a federal drug offense since that would have supported his assertion that the murders were precipitated by an argument over hauling marijuana.

We reject these claims. The evidence of Beltran-Lopez's violent history is clearly inadmissible under section 90.404, Florida Statutes (1987). If Espinosa's intention was to show that Beltran-Lopez had a generally violent character, then the evidence was inadmissible under section 90.404(1). That section states that "[e]vidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion." This general rule has several exceptions, none of which applies to this evidence. If Espinosa intended to present the evidence as similar fact evidence of other crimes, wrongs, or acts, then the evidence was inadmissible under section 90.404(2)(a) since it clearly would be offered solely to prove Beltran-Lopez's bad character or propensity.

The only basis for introducing evidence of Bernardo Rodriguez's conviction for a federal drug offense would be under section 90.404(1)(b)1, which permits the admission "of a pertinent trait of character of the victim of the crime offered by an accused."[3] Assuming, without deciding, that evidence of the conviction should have been admitted to support Espinosa's story that the murders were precipitated by an argument over transporting drugs, the error was harmless. Espinosa was allowed to present the testimony of the police officer who testified to

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[3] Section 90.610, Florida Statutes (1987), is inapplicable since that section applies to the use of criminal convictions to impeach witnesses.

the evidence linking Bernardo Rodriguez to the drug seizure at Maria Castellanos's house. Further, Bernardo's involvement in the drug trade was, at most, a peripheral issue with respect to whether Espinosa was guilty of murder.

Espinosa raises several other claims relating to the guilt phase of the trial. He claims the court should have granted his motion for costs to retain a professor of psychology to testify with respect to the reliability of eyewitness identification. We addressed that very issue in Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), where we concluded that "a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony." The trial judge did not abuse his discretion in refusing to authorize costs for the expert testimony.

We also find no merit to Espinosa's claim that the serologist should not have been able to testify to the 1979 statistics on the demographics of blood types. The trial judge thoroughly considered the relevance of these statistics before he admitted them, and defense counsel was able to effectively cross-examine the serologist as to the statistics' reliability. Finally, the trial court did not abuse its discretion in refusing to give the jury a circumstantial-evidence instruction and a specific-intent instruction.

Turning to the penalty phase of the trial, Espinosa first claims that he was denied the time and money necessary to present mitigating evidence by flying in several of Espinosa's family members from Central America to testify to a history of mental and physical child abuse. Counsel claims that he did not make the motion to bring them to the United States until the beginning of the penalty phase because Espinosa had been embarrassed to tell him about the abuse until the penalty phase was imminent. Espinosa also claims that the judge should have granted him a delay to obtain new counsel for the penalty phase of his trial. Espinosa wanted to be represented by an experienced death-penalty lawyer from Texas, and he informed his counsel of this desire at the end of the guilt phase.

Espinosa and his counsel were aware for several months that the state would seek the death penalty. On the first day of the trial, the trial judge informed Espinosa and his attorney that he would begin the penalty phase of the trial approximately two hours after the jury returned its verdicts. Espinosa's counsel agreed to the procedure. "The granting or denial of a motion for continuance is within the discretion of the trial court." Williams v. State, 438 So. 2d 781, 785 (Fla. 1983), cert. denied, 465 U.S. 1109 (1984). The trial judge did not abuse his discretion. Any prejudice to Espinosa was a result of his own delay in preparing for the penalty phase of the trial.

Further, there was no abuse of discretion in not allowing one of Espinosa's former attorneys to testify that Espinosa was a

kind, artistic person. The attorney was employed by the public defender's office which had been removed from this case because its attorneys had at one time represented both defendants. We conclude that it was not error to exclude the testimony in view of the fact the attorney was going to testify as to the character of a client based on her observations while representing him earlier in the same case and because Espinosa was allowed to present five other character witnesses on his behalf.[4] The trial judge also did not err in limiting Espinosa's testimony during the penalty phase since it was largely a disjointed narrative in which he continued to argue his innocence. Espinosa had already testified extensively during the guilt phase of the trial as to his version of the events that occurred on the night of the murders. See Sireci v. State, 399 So. 2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982), overruled on other grounds, Pope v. State, 441 So. 2d 1073 (Fla. 1983).

Espinosa next claims that the trial court should not have found the aggravating factor of a prior violent-felony conviction based on his conviction for Bernardo Rodriguez's murder. We reject this claim. See Correll v. State, 523 So. 2d 562 (Fla.), cert. denied, 109 S.Ct. 183 (1988). We also find that the trial court had sufficient evidence to find that Teresa's murder was committed to avoid arrest since she could identify the defendants

[4] See Muehleman v. State, 503 So. 2d 310 (Fla.), cert. denied, 484 U.S. 882 (1987).

and had pleaded with them to leave, promising not to call the police, and since the defendants attempted to stab Odanis to death after she had seen them in the kitchen. The attempted murder of Odanis can properly be considered in support of this aggravating factor since it was relevant to the defendants' intent during the same criminal episode.

Espinosa also argues that the jury was improperly influenced by Odanis's attempted murder when they were considering the heinous, atrocious, or cruel aggravating factor. However, we find nothing in the jury instructions or elsewhere that indicates that the jury's deliberations with respect to whether Espinosa should be executed for Teresa's murder was improperly influenced by evidence concerning the attack on Odanis. The trial judge's finding that this aggravating factor applied was supported by the medical examiner's testimony that Teresa was alive while she was being strangled and repeatedly stabbed. We reject Espinosa's complaint with respect to the text of the jury instruction on the heinous, atrocious, or cruel aggravating factor upon the rationale of Smalley v. State, 546 So. 2d 720 (Fla. 1989).

Finally, we find that the jury instructions did not denigrate the jury's role in sentencing in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). See Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). We summarily reject Espinosa's general claims as to the unconstitutionality of the death penalty. We also note that

Espinosa incorporated any applicable claims made by Beltran-Lopez in his appeal and that we have considered and rejected those claims in Beltran-Lopez v. State, No. 73,437 (Fla. July 11, 1991). Therefore, we affirm Espinosa's convictions and sentences.[5]

It is so ordered.

SHAW, C.J. and OVERTON, McDONALD and GRIMES, JJ., concur.
BARKETT, J., dissents with an opinion, in which KOGAN, J., concurs.
KOGAN, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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[5] At the oral sentencing proceeding, the trial judge erroneously sentenced Espinosa and Beltran-Lopez to a three-year statutory minimum for the life sentence for the attempted murder of Odanis. However, his written sentencing order correctly does not include a statutory minimum sentence on that count. See Lopez v. State, 470 So. 2d 58 (Fla. 3d DCA 1985).

BARKETT, J., dissenting.

Because I believe a severance of the defendants' trials was mandated in this case, I dissent. Where defendants are presenting antagonistic defenses, I believe that severance should generally be the rule in the guilt phase and should always be the rule in the penalty phase of a death case. Particularly in the penalty phase, which is premised on the principle of individualized punishment, exteme animosity between defendants detracts from the real issues in the case and creates too great a risk of unfair prejudice to the defendants to refuse severence merely for the sake of judicial economy.

While severance may not be mandated in every case involving antagonistic defenses, I agree with the court in United States v. Berkowitz, 662 F.2d 1127 (5th Cir. Unit B Dec. 1981):

> [T]he defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant. In such a situation, the co-defendants do indeed become the government's best witnesses against each other. Where two defendants present defenses that are antagonistic at their core, a substantial possibility exists []that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.[]

Id. at 1134. In this case, the defenses and aggressive tactics of Espinosa's codefendant and his lawyer clearly met this standard, thus elevating the antagonism to a level not permitted by principles of due process. See Art. I, § 9, Fla. Const. Even under the Court's view that, in general, antagonistic defenses need not always result in severance, this case goes too far.

In essence, Espinosa was fighting two adversaries as codefendant's counsel relieved the state of much of its burden of proving the state's case beyond a reasonable doubt. Codefendant's counsel went far beyond merely exculpating his client and blaming Espinosa for the crime.*

After first being cross-examined by the state, Espinosa was then vigorously cross-examined by Beltran-Lopez's counsel on all aspects of his testimony. At final argument, Beltran-Lopez's counsel again attacked Espinosa and made the state's case for it. A review of the record reveals more than mere general antagonism among codefendants. I would reverse and sever the trials in this case.

KOGAN, J., concurs.

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* For example, codefendant's counsel at opening statement told the jury:

> Mr. Espinosa goes in, takes this woman, gets on top of her and stabs her, stabs her . . . .
>
> . . . she had a gash right here on her belly that [the lead investigator] could actually see her spine from there.

KOGAN, J., dissenting.

I would recede from the pertinent holding of McCray v. State, 416 So.2d 804, 806-07 (Fla. 1982), because I believe a strong possibility always exists for jury confusion whenever the testimony of codefendants is inconsistent and antagonistic, as it was here. Such testimony invites jurors to compare one defendant against the others, thus choosing who is "most guilty."

The purpose of a criminal trial is not to gauge defendants against each other, but to gauge their alleged crimes against the requirements of the law. Sometimes this may mean that one or more defendants will receive a harsher penalty; at others it may be more lenient. The rule, in other words, is two-edged. It is necessary, I believe, to ensure that jurors minds are focused on the merits of the guilt or innocence of the accused, not on the antagonism disclosed in two or more codefendants' testimony.

Accordingly, I would reverse the conviction and sentence and order new trials in which the cases of Espinosa and Beltran-Lopez are severed.

An Appeal from the Circuit Court in and for Dade County,

Arthur I. Snyder, Judge - Case No. 86-19790-A

Sheryl J. Lowenthal, Special Assistant Public Defender, Coral Gables, Florida,

for Appellant

Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, Miami, Florida,

for Appellee

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

Defendant HENRY JOSE ESPINOSA

Case Number 86-19790-A

FILED
M. ROLLE
NOV 4 1988
RICHARD P. BRINKER
CLERK

SENTENCE

(As to Count two)

The Defendant, being personally before this Court, accompanied by his attorney K. Lange, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

☒ and the Court having on September 7, 1988 deferred imposition of sentence until this date.

(Check *either* provision if applicable)

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

IT IS THE SENTENCE OF THE COURT that:

☐ The Defendant pay a fine of $ _____ plus $ _____ as the 5% surcharge required by F.S. 960.25.
☒ The Defendant is hereby committed to the custody of the Department of Corrections.
☐ The Defendant is hereby committed to the custody of the Sheriff of DADE County, Florida.

To be imprisoned (check one; unmarked sections are inapplicable):

☐ For a term of Natural Life.
☒ ~~[illegible]~~ until such time as the Defendant is put to Death by Electrocution.

(See attached findings in support of the Death Sentence Page 1-10)

☐ For an indeterminate period of 6 months to _____ years.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm – 3 year mandatory minimum
☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking – mandatory minimum
☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( ) ( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction
☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender
☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit
☒ It is further ordered that the Defendant shall be allowed a total of 847 DAYS credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Capital – 25 year mandatory minimum
☐ It is further ordered that the 25 year minimum provisions of F.S. 775.082(1) are hereby imposed for the sentence specified in this count.

☐ It is further ordered that the entry of sentence be suspended.

Consecutive/Concurrent
It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☐ concurrent with (check one) the sentence set forth in count _____ above.

BY ORDER OF THE COURT:

P/H A.T. 20

Page 1 of 5 138:5FG1463

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

Defendant HENRY JOSE ESPINOSA

Case Number 86-19790-A

FILED
NOV 4 1988
RICHARD P. BRINKER
CLERK

SENTENCE

(As to Count one & five)

The Defendant, being personally before this Court, accompanied by his attorney K. Lange and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown

☒ and the Court having on September 7, 1988 (date) deferred imposition of sentence until this date.

(Check **either** provision if applicable)

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

IT IS THE SENTENCE OF THE COURT that:

☐ The Defendant pay a fine of $ _____ plus $ _____ as the 5% surcharge required by F.S. 960.25.
☒ The Defendant is hereby committed to the custody of the Department of Corrections.
☐ The Defendant is hereby committed to the custody of the Sheriff of DADE County, Florida.

To be imprisoned (check one; unmarked sections are inapplicable):

☒ For a term of Natural Life.
☐ For a term of _____

☐ For an indeterminate period of 6 months to _____ years.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm — 3 year mandatory minimum: ☒ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking — mandatory minimum: ☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction: ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender: ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit: ☒ It is further ordered that the Defendant shall be allowed a total of 847 DAYS credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Capital — 25 year mandatory minimum: ☐ It is further ordered that the 25 year minimum provisions of F.S. 775.082(1) are hereby imposed for the sentence specified in this count.

☐ It is further ordered that the entry of sentence be suspended.

Consecutive/Concurrent: It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☒ concurrent with (check one) the sentence set forth in count two above.

OFF RECDA

CASE NO. 21 Page 24:1 5 13C05PG1464

2

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

Defendant HENRY JOSE ESPINOSA

Case Number 86-19790-A

SENTENCE

(As to Count three)

The Defendant, being personally before this Court, accompanied by his attorney K. Lange and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

(Check **either** provision if applicable)

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

IT IS THE SENTENCE OF THE COURT that:

☐ The Defendant pay a fine of $ _____ plus $ _____ as the 5% surcharge required by F.S. 960.25.
☒ The Defendant is hereby committed to the custody of the Department of Corrections.
☐ The Defendant is hereby committed to the custody of the Sheriff of DADE County, Florida.

To be imprisoned (check one; unmarked sections are inapplicable):

☒ For a term of Natural Life.
☐ For a term of _____

☐ For an indeterminate period of 6 months to _____ years.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm — 3 year mandatory minimum: ☒ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking — mandatory minimum: ☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction: ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender: ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit: ☒ It is further ordered that the Defendant shall be allowed a total of 847 DAYS credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Capital — 25 year mandatory minimum: ☐ It is further ordered that the 25 year minimum provisions of F.S. 775.082(1) are hereby imposed for the sentence specified in this count.

☐ It is further ordered that the entry of sentence be suspended.

Consecutive/Concurrent: It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☒ concurrent with (check one) the sentence set forth in count one & five above.

OFF RECDA

CASE NO. 22 Page 24:2 5 13C05PG1465

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

FILED
NOV 4 1988
RICHARD

Defendant HENRY JOSE ESPINOSA

Case Number 88-19790-A

SENTENCE

(As to Count four)

The Defendant, being personally before this Court, accompanied by his attorney, K. Lange and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

☒ and the Court having on September 7, 1988 (date) deferred imposition of sentence until this date.

(Check either provision if applicable)

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

IT IS THE SENTENCE OF THE COURT that:

☐ The Defendant pay a fine of $ _____ plus $ _____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections.

☐ The Defendant is hereby committed to the custody of the Sheriff of DADE County, Florida.

To be imprisoned (check one; unmarked sections are inapplicable):

☐ For a term of Natural Life.

☒ For a term of FIVE (5) YEARS

☐ For an indeterminate period of 6 months to _____ years.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm – 3 year mandatory minimum: ☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking – mandatory minimum: ☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( ) ( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction: ☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender: ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit: ☒ It is further ordered that the Defendant shall be allowed a total of 847 DAYS credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Capital – 25 year mandatory minimum: ☐ It is further ordered that the 25 year minimum provisions of F.S. 775.082(1) are hereby imposed for the sentence specified in this count.

☐ It is further ordered that the entry of sentence be suspended.

Consecutive/Concurrent: It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☒ concurrent with (check one) the sentence set forth in count three above.

OFF RECDS

Defendant HENRY JOSE ESPINOSA

Case Number 88-19790-A

Consecutive/Concurrent (As to other convictions): It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☐ consecutive to ☐ concurrent with (check one) the following:

☐ Any active sentence being served.

☐ Specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of DADE County, Florida is hereby ordered and directed to deliver the defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends: _____

DONE AND ORDERED in Open Court at Miami, Dade County, Florida, this 4TH day of NOVEMBER A.D., 1988.

JUDGE

ARTHUR I. SNYDER

OFF RECDS

Rule 3.988(a)

Category 1: Murder, Manslaughter
Chapter 782 [except subsection 782.04(1)(a)]
and subsection 316.193(3)(c)3

1. DOCKET NUMBER/PRIMARY OFFENSE	3. COUNTY	4. JUDGE	5. DATE OF SENTENCE
86-19790A	Dade	Snyder	11/4/88

2. DOCKET NO. (ADDITIONAL CASES)	6. NAME	7. DATE OF BIRTH	8. SEX
	Henry Jose Espinosa	12/19/56	X ☐ M ☐ F

9. DATE OF OFFENSE	10. PRIMARY OFFENSE AT CONVICTION	11. DEGREE
7/10/86	Second Degree Murder w/Firearm	Life

12. ☐ PROBATION VIOLATION ☐ COMMUNITY CONTROL VIOLATION	13. ☐ PLEA X TRIAL	14. ☐ GUIDELINE SENTENCE IMPOSED ☐ DEPARTURE FROM GUIDELINE

I. Primary offense at conviction

Degree	Number of Counts 1	2	3	4	Points
Life	165	226	286	346	165
1st punishable by life	150	195	276	336	
1st	136	165	226	286	
2nd	77	93	106	121	
3rd	45	55	65	75	

Primary offense counts in excess of four (from back) _____

II. Additional offense at conviction

Degree	Number of Counts 1	2	3	4	Points
Life	61	73	79	85	61
1st pbl	45	54	58	63	45
1st	29	35	38	41	
2nd	16	19	21	22	
3rd	10	12	13	14	14
MM	2	3	4	5	

Additional offense counts in excess of four (from back) _____

III. Prior record

Degree	Number of Prior Convictions 1	2	3	4	Points
Life	50	110	180	270	
1st pbl	40	88	138	216	
1st	30	66	96	162	
2nd	15	33	48	81	
3rd	5	11	18	27	
MM	1	2	4	6	

Prior convictions in excess of four (from back) _____

Prior DUI convictions _____ x 32 = _____

IV. Legal status at time of offense

No restrictions	0	
Legal constraint	21	_____

V. Victim injury (physical)

None	0	
Slight	7	
Moderate	14	
Death or severe	21	21

Reasons for departure: Total 306

Guideline Sentence:
22-27 years

Sentence imposed, indicating length and type (Please print or type)

Life Imprisonment

FOR OFFICE USE ONLY

Offense Code

T.S.

S.P.

Prob.

C.C.

C.J.

FILED
NOV 4 1988
RICHARD P. BRINKER
CLERK

Arthur I. Snyder
Sentencing Judge

Janet Reno
State Attorney

Henry Espinosa/Ken Lange
Defendant/Defense Counsel

Kevin V. DiGregory/A.S.A.
Scoresheet Preparer

Second Degree Murder conviction is capital crime of Felony in which crime was committed involves cruelty to victim DJ

OFF RECDS
13095PG1468

1

SG1 - effective 7 1 84

DISTRIBUTION
White — Court File
Green — Sentencing Guidelines Commission
Yellow — State Attorney
Pink — Defendant/Defense Counsel
Goldenrod — Scoresheet Preparer

25

1. Please print or type the information entered upon the scoresheet and use sufficient pressure to assure that all copies will be legible.

2. Enter the court case, court file, or docket number for the primary offense.

3. Enter the docket numbers for the additional cases presently before the court for sentencing.

4. Enter the name of the county where the sentence is imposed.

5. Enter the name of the sentencing judge.

6. Enter the date sentence was imposed.

7. Enter the defendant's full name.

8. Enter the defendant's date of birth.

9. Enter the defendant's sex.

10. Enter the date of the primary offense. If there are multiple counts of the primary offense occurring on different dates, enter the earliest date.

11. Enter the common title of the primary offense at conviction with sufficient specificity to distinguish it from other offenses within the same chapter.

12. Enter the statutory felony degree of the primary offense. The following abbreviations may be used:

L Life felony
1pbl first-degree felony punishable by life
1 first-degree felony
2 second-degree felony
3 third-degree felony

13. Check the appropriate box if the sentence is imposed for a violation of probation or community control.

14. Indicate whether adjudication was obtained by plea or trial. If convictions were obtained by trial for some offenses and by plea on other counts, check the trial box.

15. Indicate whether the guideline sentence has been imposed or whether the sentence represents a guideline departure.

Category 1
Murder, Manslaughter

Points	Recommended Range
66	any nonstate prison sanction
67-92	Community Control or 12-30 mos. incarceration
93-135	5 yrs. incarceration (3-7)
136-164	10 (7-12)
165-225	15 (12-17)
226-285	20 (17-22)
286-345	25 (22-27)
346-381	30 (27-40)
382 +	Life

The following factors shall be used when counts of primary offense, additional offenses or prior record exceed four. These tables are used only for those counts in excess of four. The point total for the counts in excess of four should then be entered on the face of the scoresheet.

II. Number of Additional Offense Counts Above 4

Degree			
Life	_____	X 6 =	_____
1st pbl	_____	X 5 =	_____
1st	_____	X 4 =	_____
2nd	_____	X 3 =	_____
3rd	_____	X 2 =	_____
MM	_____	X 1 =	_____

I. Number Primary Offense Counts Above 4

Degree			
L	_____	X 165 =	_____
1pbl	_____	X 150 =	_____
1st	_____	X 136 =	_____
2nd	_____	X 77 =	_____
3rd	_____	X 45 =	_____

III. Number of Prior Convictions Above 4

Degree			
Life	_____	X 50 =	_____
1st pbl	_____	X 40 =	_____
1st	_____	X 30 =	_____
2nd	_____	X 15 =	_____
3rd	_____	X 5 =	_____
MM	_____	X 1 =	_____

26

45A

DFF

THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT ... FLORIDA,
IN AND FOR DADE COUNTY

CASE NUMBER 86-19790 A
JUDGE SNYDER

FILED
NOV 4 1988
RICHARD P. BRINKER
CLERK

STATE OF FLORIDA,
Plaintiff,
vs.
HENRY JOSE ESPINOSA,
Defendant.

ORDER

THIS CAUSE came to be heard before the Court for the determination of an appropriate sentence following a conviction by a jury of both defendant Henry Jose Espinosa and defendant Mauricio Beltran-Lopez of one count of Second Degree Murder in the death of Bernardo Rodriguez, one count of First Degree Murder in the death of Theresa Rodriguez, one count of Attempted First Degree Murder, one count of Armed Burglary, and one count of Grand Theft.

The issue of guilt or innocence was tried by a duly impanelled jury from August 29, 1988, to September 8, 1988.

A separate sentencing proceeding, as required by Florida Statutes 775.082 and 921.141 was presented before the same jury on September 9, 1988. By a vote of 11 to 1, the jury recommended to the Court that it impose the death penalty upon Henry Jose Espinosa. This Order will be in three (3) parts. First, the Court will make findings of fact based upon the evidence presented in both the trial and penalty phases. Second, the Order will determine which aggravating and mitigating factors were proven by the evidence. Third, the Court will determine if there are sufficient aggravating circumstances which warrant the imposition of the death penalty and, if so, whether there are any mitigating circumstances which outweigh or mitigate those aggravating circumstances.

4:C OFF REC BK 13095PG1469

I.

the evidence presented in Court, primarily the of Odanis and Odenia Rodriguez; physical evidence at ; the expert testimonies of Serologist Kathleen Nelson Metro-Dade Police Department Crime Laboratory, Technician ey Lowe, a Metro-Dade Police Department Latent Fingerprint examiner and Associate Medical Examiner Roger Mittleman, M.D., as well as the other testimony, the Court makes the following findings of fact:

The defendant, along with co-defendant Mauricio Beltran-Lopez entered the home of victims Theresa and Bernardo Rodriguez and their daughters, Odenia and Odanis, during the early morning hours of July 10, 1986. During a violent struggle, the defendants shot and stabbed Bernardo Rodriguez. They then turned their attention to Theresa Rodriguez. While Henry Espinosa held a knife, Mauricio Beltran-Lopez held this female victim by the arm and they dragged her to the master bedroom. While she lay on the bed, Mauricio Beltran-Lopez suffocated her with a pillow while Henry Espinosa repeatedly stabbed her with a knife. The gold chains on her neck were pressed against her neck with such force that their impressions were left on her skin. The cause of her death was stabbing, strangling and suffocation. The medical evidence is uncontroverted that all of the stab wounds were inflicted while Theresa Rodriguez was alive. The medical evidence is uncontroverted that she was alive while the pillow was being pressed against her face. The medical evidence is uncontroverted that she was alive while her gold chains were forcibly pressed against her neck.

Because of these medical facts, because she was dragged into her bedroom by Beltran-Lopez and the knife-wielding Espinosa after her husband had already been shot and stabbed, and because she was pleading with Henry Espinosa that if he left she would not call the police, it is clear that Theresa Rodriguez was keenly aware of her impending death.

The killers' next action was to lure Odanis Rodriguez out of her bedroom. As she opened her bedroom door, Beltran-Lopez

4:7 OFF REC BK 13095PG1470

FINDING

There was no evidence that the defendant was under sentence of imprisonment when the murder for which he was convicted was committed and, therefore, this aggravating factor is not applicable.

(2) F.S. 921.151(5)(b) - Whether the defendant was previously convicted of another capital felony or of a felony involving the use of or threat of, violence to the person?

The second degree murder of Bernardo Rodriguez is a contemporaneous conviction which leads the Court to conclude that the aggravating circumstance was proven beyond and to the exclusion of a reasonable doubt. This conclusion is appropriate as the killing of Bernardo Rodriguez was a crime against a victim other than the victim of the capital felony. See Correll v. State, 523 So.2d 562 (Fla. 1988).

(3) F.S. 921.141(5)(c) - Whether the defendant knowingly created a great risk of death to many persons?

FINDING

There is no evidence that the defendant knowingly created a great risk of death to many persons and, therefore, this aggravating circumstance is not applicable.

(4) F.S. 921.141(5)(d) - Whether the defendant was engaged in, or was an accomplice, in the commission of, or an attempt to commit, of flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb?

The defendant was convicted of armed burglary. The killing of Theresa Rodriguez occurred during the commission of that armed burglary. Therefore, this aggravating factor has been proven beyond a reasonable doubt.

OFF REC BK 13895PG1472

(5) F.S. 921.141(5)(e) - Whether the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody?

All of the evidence, including the testimonies of both defendants, indicates that the first victim was Bernardo Rodriguez. After the attack on him, Theresa Rodriguez begged for her life, promising Henry Espinosa, a former neighbor, that she would not call the police. It is clear to this Court that she was killed because she could identify the defendants and was a witness to the attack on her husband. The most convincing evidence of the intention on the part of the killers to eliminate Theresa Rodriguez as a witness is their subsequent attack on Odanis Rodriguez. Odanis had seen both defendants holding her mother and they had seen her. After her mother was stabbed, strangled and suffocated, Odanis was tricked into opening the door of her room so that she too could be eliminated as a witness. The Court thus finds that the murder of Theresa Rodriguez was committed for the purpose of avoiding or preventing a lawful arrest.

(6) F.S. 921.141(5)(f) - Whether the capital felony was committed for pecuniary gain?

FINDING

The capital felony was not committed for pecuniary gain. The Court does not find this aggravating circumstance applicable.

(7) F.S. 921.141(5)(g) - Whether the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function?

FINDING

The Court finds that this aggravating circumstance is clearly a doubling up of the aggravating circumstance just discussed in F.S. 921.141(5)(e), and is therefore not given any

OFF REC BK 13895PG1473

additional weight. The Court does not find this aggravating circumstance applicable.

(8) F.S. 921.141(5)(h) - Whether the capital felony was especially heinous, atrocious or cruel?

The Court finds this homicide was extremely heinous, atrocious and cruel. The Court saw the photographs of the crime scene and the autopsy. The Court recalls the testimony of Dr. Roger Mittleman, Associate Medical Examiner for Dade County, that Theresa Rodriguez, whether she was conscious for 15 seconds or 15 minutes, was aware that she was going to die and that she suffered an agonizing death.

The Court recalls the testimony of Odanis Rodriguez that shows that even before she was stabbed, strangled or suffocated, Theresa Rodriguez knew she was going to die. She was taken to her bedroom at knifepoint while she begged for her life.

The Court agrees with the prosecutor's characterization of Theresa Rodriguez's murder as overkill. She was stabbed five times in the torso with one gaping wound to her chest piercing the heart and a lung and having for its terminus the inside of her spine. She was suffocated with a pillow and manually strangled forcefully enough to cause petechiae and to leave the impression of the gold chains she wore around her neck in her skin. The medical evidence and the eyewitness testimony convinces this Court beyond a reasonable doubt that this murder was heinous, atrocious and cruel.

(9) F.S. 921.141(5)(i) - Whether the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

FINDING

There is no evidence that this murder was committed with heightened premeditation. The Court does not find this aggravating circumstance applicable.

MITIGATING CIRCUMSTANCES

(1) F.S. 921.141(6)(a) - Whether the defendant had a significant history of prior criminal activity?

FINDING

The defendant does not have a significant history of prior criminal activity. The Court finds this mitigating circumstance is applicable.

(2) F.S. 921.141(6)(b) - Whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance?

FINDING

There is no evidence that the murder of Theresa Rodriguez was committed while the defendant was under the influence of extreme mental or emotional disturbance. Defendant Espinosa continued to profess his innocence at the penalty phase of this trial. Therefore, the Court does not consider this a mitigating circumstance.

(3) F.S. 921.141(6)(c) - Whether the victim was a participant in the defendant's conduct or consented to the act?

FINDING

There is no credible evidence that Theresa Rodriguez was involved in any criminal activity with the defendant or that she in any way agreed or consented to his conduct or actions, thus this mitigating circumstance does not exist.

(4) F.S. 921.141(6)(d) - Whether the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor?

FINDING

The Court specifically rejects as incredible the testimony of defendant Henry Jose Espinosa that he did not participate in

the killing of Theresa Rodriguez. Defendant Espinosa was seen ding the knife just before the victim was taken to her bedroom and stabbed repeatedly and he was still holding the knife after her murder and used it yet again on Odanis Rodriguez. Therefore, this mitigating circumstance does not exist.

(5) F.S. 921.141(6)(e) - Whether the defendant acted under extreme duress or under the substantial domination of another person?

FINDING

The Court again finds the testimony of defendant Espinosa that defendant Beltran-Lopez acted alone in the murder of Theresa Rodriguez to be incredible. There is no credible evidence that this defendant was under duress or domination when the victim was killed. Therefore, this mitigating circumstance does not exist.

(6) F.S. 921.141(6)(f) - Whether the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirement of the law was substantially impaired?

FINDING

There was no evidence that this defendant did not appreciate the criminality of his conduct, or that his capacity to conform his conduct to the requirements of the law was substantially impaired; and therefore, the Court does not consider this a mitigating circumstance.

(7) F.S. 921.141(6)(g) - The age of the defendant at the time of the crime.

FINDING

The defendant was twenty-nine years of age at the time of the murder of Theresa Rodriguez. By that time in his life, he had already fathered four children, had married once and divorced

and had attended a university in Nicaragua. Therefore, the Court does not consider this a mitigating circumstance.

As to non-statutory mitigating circumstance, several friends of the defendant testified during the penalty phase. One spoke of her love for him and her desire to marry him. Another spoke of his kindnesses to her grandchildren and her love and their love for him. The Court does give some weight to this testimony.

In order to further protect the interest of the defendant, this Court ordered a Pre-Sentence Investigation Report which this Court has examined, has given counsel for the State and the defendant copies of same to examine, and has given them opportunity to discuss and/or refute said report. This Court finds there are no additional mitigating circumstances set forth in the Pre-Sentence Investigation Report that are pertinent, other than that heretofore indicated in this Order.

This Court has not used any information unknown to the defendant or his counsel of record or any information which they have not had an opportunity to explain or deny in imposing sentence. Gardiner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

III.

This Court must now weigh the circumstances found in mitigation against those found in aggravation in order to determine the appropriate sentence.

This Court understands that a mere quantitative accounting process of aggravating versus mitigating circumstances is inappropriate. The Court must make a reasoned judgment based upon the qualitative weighing of these factors to determine whether the factual situation in this case requires that the recommendation of the jury be followed or that a sentence of life imprisonment be imposed.

This Court finds that there are two (2) mitigating factors, one statutory and one non-statutory, which were proven in this case. This Court has reviewed the entire record, including the testimony and evidence in the trial and sentencing proceedings to

determine whether there might possibly exist anything else, w' ever, of a non-statutory mitigating nature, t could be considered by this Court in mitigation of this sentence.

Looking at the circumstances from a quantitative viewpoint, that is, by just adding the aggravating and mitigating circumstances, it is found that the numerical count would be 4 to 2 in favor of the aggravating circumstances.

Looking at the circumstances from a qualitative viewpoint, it is easily concluded that the magnitude of the crime and the circumstances surrounding it vastly overshadows the mitigating circumstances as set forth herein.

WHEREFORE, upon the preceding specific findings of fact, the Court is of the opinion that there are sufficient aggravating circumstances to justify the sentence of death; and this Court is of the opinion that the mitigating circumstances do not outweigh the aggravating circumstances enumerated.

It is therefore the Judgment and Sentence of this Court that as to Count II, the First Degree Murder of Theresa Rodriguez, you, HENRY JOSE ESPINOSA, be adjudicated guilty of Murder in the First Degree and that you be sentenced to death.

It is further ORDERED that you, HENRY JOSE ESPINOSA, be taken by the proper authority to the Florida State Prison and there be kept under close confinement until the date of your execution is set.

You, HENRY JOSE ESPINOSA, are hereby notified that this judgment, and sentence of death under Florida law are subject to automatic review by the Florida Supreme Court.

DONE AND ORDERED in Miami, Dade County, Florida, this the 4th day of November, 1988.

ARTHUR I. SNYDER
CIRCUIT JUDGE

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425

OFF REC BK

(10)

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STATE OF FLORIDA

UNIFORM COMMITMENT TO CUSTODY OF DEPARTMENT OF CORRECTIONS

The Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County,

SPRING Term, 1988 In the Case # 86-19790-A

STATE OF FLORIDA

vs

HENRY JOSE ESPINOSA

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DEPARTMENT OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the offense specified herein in the above styled Court, and the defendant having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of Indictment/Information, Judgment and Sentence which are hereby made parts hereof;

Now therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant, together with any pertinent Investigation Report prepared in this case, into the custody of the Department of Corrections of the State of Florida; and this is to command you, the said Department of Corrections, and, other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Department of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable ARTHUR I. SNYDER
Judge of said Court, and also RICHARD P. BRINKER, Clerk
and the Seal thereof, this 4TH day of
NOVEMBER (Month), 19 88

RICHARD P. BRINKER, Clerk

By: Deputy Clerk

CIRCUIT & COUNTY COURTS
IN GOD WE TRUST
Dade County, Florida

36

426

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,436

HENRY JOSE ESPINOSA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING OR CLARIFICATION

Appellant HENRY JOSE ESPINOSA, through counsel and pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure, hereby files this Motion for Rehearing or Clarification addressed to the decision of this Court dated July 11, 1991 affirming the conviction and death sentence on all issues raised. Appellant submits that in entering its opinion, the Court may have overlooked, misapprehended or failed to consider the following points of fact or law:

Factual Background

At page 4 of the slip opinion, the Court refers to "over a thousand pounds of marijuana" found at the Castellanos house. It may or may not be significant, but the detective testified that the "suspected marijuana" turned out to be phony. It smelled like the real thing, but it was sterile, which, he said, was unusual in the Miami drug business.

Severance of Defendants

This Court relies on McCray v. State, 416 So.2d 804, 806 (Fla. 1982) to affirm the denial of severance. In McCray, this Court quotes Rule 3.152(b)(1), Florida Rules of Criminal Procedure which provides that a severance should be granted whenever necessary "to promote a fair determination of the guilt or innocence of one or more defendants;" and states that there is no absolute right to separate trials when defendants blame each other for the crime; and that a fair determination of each defendant's guilt or innocence may be achieved when all relevant evidence regarding the offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts and conduct and statements and can apply the law without confusion.

The issue of whether a severance is required must be addressed on a case by case basis. A severance is not required just because a defendant might have a better chance of acquittal. Hostility among defendants or an attempt by one defendant to blame the other is not "a sufficient reason, by itself, to require severance;" and when defendants confront one another and are subject to cross-examination upon testifying, the jury is afforded access to all relevant facts. Slip opinion, pages 6 to 8.

We have no quarrel with the general principles stated above. But when applied to the record before the Court in this case, the only conclusion can be that what happened here goes beyond what is contemplated by those general principles. This case is far more egregious than most.

The opinion holds that the fact that Espinosa testified at trial and was subject to examination by Beltran-Lopez's attorney is not a sufficient reason to grant severance. In reaching this conclusion, the Court may have overlooked or failed to consider that co-defendant Mauricio Beltran did not just cross examine Henry Espinosa. He virtually prosecuted Espinosa.

Throughout the trial, at every stage of the proceedings, Henry Espinosa was attacked by not one, but two prosecutors. Espinosa had to defend himself not only against the state, but also against a second and more vicious prosecutor, his co-defendant. While Espinosa was not entitled to a perfect trial, he certainly was entitled to a fair trial, and he did not receive a fair trial.

During opening statement, Beltran's counsel painted a picture of Henry Espinosa that was more graphic, more horrendous and more sinister than the prosecutor's. Beltran told the jury that it was Espinosa who began fighting

with Bernardo Rodriguez; that it was Espinosa who took the gun from Teresa Rodriguez; that it was Espinosa who grabbed Teresa Rodriguez and stabbed her; that Espinosa stabbed her so violently that she had a gash on her belly from which the case investigators could see her spine; that the little girl was stabbed "all these times;" that Espinosa told Beltran that there was another child in the house; that Beltran wanted to leave but Espinosa wanted to stay and take the money because Bernardo Rodriguez owed it to him; that Beltran's mistake was in not tuning in Espinosa because they were friends; and that Beltran had nothing to do with the killings.

While this is what we might expect a prosecutor to do in opening statement, it certainly goes way beyond what ought to be considered acceptable opening statement by a co-defendant in a joint trial. Maybe this opening statement without more, does not warrant the granting of a severance.

However it is the grilling and accusatory cross examination of Henry Espinosa by Beltran's counsel which sends this case far beyond the acceptable, expected and tolerable antagonism/hostility category, because it totally deprived Henry Espinosa of a fair trial.

The foundation of the American system of criminal justice is that a defendant charged with a crime is presumed innocent until proven guilty. We thought this meant proven guilty by the state. Where is the fairness if the defendant is proven guilty by another defendant?

The state has its prosecuting attorneys. The state has its witnesses and its evidence. The state has a case to present and the jury must decide the guilt or innocence of the defendant based upon the state's case. This is the system. But this is not what Henry Espinosa faced. He had to defend himself against two prosecuting bodies, the state and Mauricio Beltran.

The cross examination of Henry Espinosa by Beltran was as vigorous and as vicious, if not more so, than by the state. Beltran suggested outright, on cross examination that Espinosa's testimony at trial was a lie: "this is the first time you've told anyone this story, haven't you?"

With true prosecutorial zeal, Beltran's counsel grilled Espinosa about whether he killed Bernardo Rodriguez and Teresa Rodriguez; whether he had marital problems; whether he had a business disagreement with Bernardo; why he did not tell the police about what had happened; why he did not visit Odanis in the hospital; and why Espinosa felt threatened by

Beltran not to go to the police, but not sufficiently threatened to tell him to leave his house.

After Espinosa was subjected to this inquisition by Beltran's counsel, Beltran who had announced that he would testify at the trial apparently changed his mind in order to save himself from being roasted the way his counsel had roasted Espinosa on the witness stand:

> After seeing what goes on, it's his desire not to testify.

As a result, Espinosa never had a chance to cross-examine his main accuser with respect to the theories, arguments, suggestions, accusations and innuendos about Espinosa's full responsibility for the crimes that came to the jury from Beltran's counsel.

And maybe even the opening statement and the vicious cross examination were not the worst of it. At the close of the evidence, Beltran's counsel made a superb prosecutorial closing argument against Henry Espinosa.

He accused Espinosa of being involved with Bernardo Rodriguez in the dope business; he told the jury that Espinosa killed Teresa because she know him and could identify him; he told the jury not to believe Espinosa; he

referred to Espinosa's testimony as "Amazing Stories;" he said that all of the evidence pointed to Espinosa and that Espinosa had a motive for the crimes; he argued again that Espinosa committed the "senseless murder" of Teresa Rodriguez so she would not identify him; he argued that Beltran had no motive; that this was a problem between drug dealers; that Espinosa stopped to "take care" of the witnesses Teresa and Odanis; and that when Espinosa stabbed Odanis, his motive was to eliminate a witness who could identify him.

This sounds like the prosecutor's closing argument, but it was not. This is no way can be characterized as a fair trial for Henry Espinosa. We implore this Court to grant a rehearing and to issue an opinion consistent with the two dissenting opinions.

As stated by Justice Barkett at pages 17, 18 of the slip opinion,

> . . . In this case, the defenses and aggressive tactics of Espinosa's codefendant and his lawyer clearly met this standard, thus elevating the antagonism to a level not permitted by principles of due process. See Art. 1, Section 9, Fla. Const. Even under the court's view that, in general, antagonistic defenses need not always result in severance, this case goes too far.
>
> In essence, Espinosa was fighting two adversaries as codefendant's counsel relieved the state of much of its burden of proving the state's case beyond a reasonable doubt. Codefendant's counsel went far beyond merely exculpating his client and blaming Espinosa for the crime.

And in the second dissenting opinion, Justice Kogan suggests that the Court recede from the holding of McCray because the strong possibility always exists for jury confusion whenever the testimony of codefendants is inconsistent and antagonistic, as it was here.

> The purpose of a criminal trial is not to gauge defendants against each other, but to gauge their alleged crimes against the requirement of the law. Sometimes this may mean that one or more defendants will receive a harsher penalty; at others it may be more lenient. The ruling, in other words, is two-edged. It is necessary, I believe, to ensure that jurors minds are focused on the merits of the guilt or innocence of the accused, not on the antagonism disclosed in two or more codefendants' testimony.

At page 8 of the slip opinion, the majority states that

> No evidence was introduced in this trial that could not have been introduced against either Espinosa or Beltran-Lopez if either had been tried alone. Therefore, we find that Espinosa and Beltran-Lopez were not entitled to a severance.

Most respectfully, what the Court may have overlooked in reaching that conclusion, is that Espinosa would not have been subjected to the arguments, innuendos, accusations and theories of the crime which were broadcast to the jury by

Beltran's counsel. Henry Espinosa could not overcome this seriously prejudicial aspect of his trial which prevented him from fairly defending himself.

Consistent with the dissenting opinions, we respectfully implore the Court to grant a rehearing and to issue an opinion reversing the conviction and sentence and ordering a new and separate trial for Henry Jose Espinosa.

Denial of Expenses for Expert in Fingerprints, Serology and Forensic Pathology

In preparation for a Motion for Rehearing on this issue, counsel has carefully inspected the Record on Appeal to discover the reasons why the trial judge would deny this motion. Counsel is unable to locate any order of denial by the court, either oral or in writing, in the entire Record.

Counsel requested that the original court file be brought to the Metropolitan Justice Building on an expedited basis so she could review the original court papers. Counsel has reviewed that file and cannot find any order on the motion which may be found in the Record on Appeal at R-50.

The usual procedure in Circuit Court in Dade County, is that when a motion is argued in open court, a notation of the court's ruling is made on the face of the motion itself and on the docket sheet. The original motion and the docket

sheet are both in the court file. There is no notation on this motion, and no order on the docket sheet directed to this motion.

Counsel examined the original motion in the court file to determine whether the Clerk might have made a notation on the back of either page. There is no notation on the front or back of either page.

Counsel then made an intensive review of all 12 pages of the Clerk's docket sheet. A copy of the docket sheet is included in the Appendix at the end of this motion as App. 1 to 12.

It now turns out that the docket entry which counsel originally, mistakenly believed was a denial of the subject motion for expenses for an expert in fingerprints, serology and forensic pathology is a ruling on a different motion for expenses for an expert, and does not apply to the motion at R-50. See App. 7.

The Court's attention is directed to App. 7. The first written entry on the page is the following:

> DEC 04 1987 (AB) See mtn for costs for expert witness - Denied
>
> O/M for telephone records - granted

On appeal, the undersigned raised all arguable issues, and assumed that this docket entry "mtn for costs for expert witness - Denied" referred to the motion at R-50.

It is now clear that counsel was wrong. This docket entry for December 4, 1987 refers to a hearing held on that date, in the record at R-530 to 538. A copy of pages 530 to 538 are included in the Appendix hereto as App. 13 to 21.

Review of those pages reflects that the only motion for a defense expert argued on that day, was the motion for eye-witness identification expert Dr. Elizabeth Loftus (see the next section of this motion). Counsel for the defense and for the state presented their arguments at pages 531 to 535 (App. 14 to 18). The court explained why it uniformly denies such motions at 535 to 537 and at 538, announced "Your motion is denied" (App. 18 to 20, and 21), whereupon the defense argued a motion for telephone records (R-538) (App.21).

Counsel's statement in the Initial Brief that the trial court denied the defense motion for expenses for fingerprint, serology and forensic pathology experts is incorrect. That issue was raised in an abundance of caution to avoid omitting any arguable issues. However, it now appears that the issue was improvidently raised. The record is silent. Counsel has spoken with Herbert Smith, the Assistant Public Defender who

represented Henry Espinosa until the spring of 1988. He stated that to the best of his recollection, the motion was GRANTED. A copy of an affidavit prepared by Mr. Smith is included in the Appendix as App. 22.

With all due respect, and with regret for inconvenience this may cause the Court, because counsel improvidently raised this issue on appeal; because this Court rules only on issues which are properly before it; and because this issue attributes to the trial judge, a ruling which apparently he did not make - for all of these reasons, we respectfully move this Court to delete that portion of the paragraph on page 11 of the slip opinion relating to the motion for expenses for fingerprint, serology and forensic pathology experts.

But if that portion of the opinion is not withdrawn, we respectfully request a rehearing because the opinion relies on a federal test which, until now, has not been the law of Florida. The opinion quotes Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.)(en banc), cert. denied 481 U.S. 1054 (1987) that the defense must show more than a mere possibility of assistance from a requested expert; defendant must show a reasonable probability that denial of expert assistance would result in a fundamentally unfair trial. This places an impossible burden on the defense to know what an expert would

find, before the expert is retained. To the contrary, Section 914.06 (1989), Florida Statutes provides that assistance must be provided when the defense (or the state) "requires the services of an expert witness whose opinion is relevant to the issues of the case."

There are due process and right to counsel implications arising from denial of experts. For example, Mason v. Arizona, 504 F.2d 1345, 1352 (9th Cir. 1974) holds that the Ninth Circuit's interpretation of the Criminal Justice Act, 18 U.S.C. 3006A applies to the states as a matter of providing constitutionally effective counsel.

Accordingly, if the holding regarding expenses for experts remains in this opinion, then we respectfully ask the Court to grant a rehearing to allow the parties to brief the issue, including whether this Court ought to also adopt the "reasonable independent attorney" standard, whether the defense is entitled to an ex parte hearing to explain to the Court why the expert is needed and the impact such a standard will have on the state and federal constitutional guarantees of due process, equal protection and the right to counsel.

Denial of Expert for Eyewitness Identification

In affirming the denial of the defense motion for expenses to retain Dr. Elizabeth Loftus, an expert on

eyewitness identification, the Court relies on its decision in Johnson v. State, 438 So.2d 777 (Fla. 1983) which is right on point. We do not dispute that this Court and the district and circuit courts of Florida have uniformly refused to grant expenses for Dr. Loftus, or to recognize eyewitness expert testimony as admissible evidence. Nor can we dispute that the courts in some other states also uniformly refuse to recognize such testimony.

However, there are states in which the testimony is routinely accepted and admitted. In refusing to allow this eyewitness identification expert assistance and/or testimony, this Court may have overlooked or misconstrued the thrust of the research done by Dr. Loftus, and exactly how well qualified she is to educate jurors, judges and lawyers alike on what may seem to be something of a nature not to require any special knowledge or experience. However, there is more to a presentation by Dr. Elizabeth Loftus than meets the eye.

Counsel has had the privilege of attending a continuing education lecture presented by Dr. Elizabeth Loftus and found it to be not only fascinating, but also informative, truly educational and most interestingly of all, tremendously surprising.

Unless the members of this Court have heard Dr. Loftus speak, or have reviewed a transcript of her lecture or courtroom testimony, then, most respectfully, the barring of eyewitness identification testimony in the courts of Florida has been mandated without a full understanding of just how helpful Dr. Loftus can be to the truthfinding function in a case such as this.

As counsel recalls the lecture, Dr. Loftus speaks about an experiment in which she showed a film of an automobile accident to a group of subjects. On information and belief, they may have been college students.

When the film was over, Dr. Loftus asked the subjects what color the car was. Some said dark blue. Others said beige. In reality, the car was light blue, a combination somewhere in between what the various subjects recalled as being the details of the event.

The subjects were also asked about the traffic sign at the intersection. While some subjects answered that it was a "STOP" sign, in reality, it was a "SLOW" sign.

People who witness events can be confused. They can have different perceptions of an event, and be perfectly truthful in what they recount as their recollection, yet they can still be partially or totally wrong.

Another experiment which Dr. Loftus described in her lecture involved two of her students in a bus station. A female student was seated on a bench in the bus station, holding a tote bag. A male student ran up to her, and then ran away from her. The female student began yelling "Help. He stole my radio."

When the witnesses in the bus station were questioned about the incident, they were asked to describe the radio. There were as many descriptions of the radio as there were witnesses to the incident. The descriptions ranged from a large boom box to a small personal headphone cassette player/radio. Some witnesses said she was holding it in her hand; others said it was in the tote bag.

The reality? She never had a radio at all.

These people were just witnesses to an incident which happened to be an experiment for a college psychology course. The danger of a jury returning an incorrect verdict based upon inaccurate eyewitness testimony does not exist in an experiment. But the possibility for confusion and for a wrong jury verdict is very real and very dangerous in a trial such as this one.

Being an observer, as opposed to being the victim also has an impact on how well one remembers an event, and the

accuracy of what will be remembered. Being the victim of a traumatic and violent event, and being seriously injured during the event, may well affect the ability to remember and recount with precision the details.

Accordingly, based on the foregoing, we respectfully ask this Court grant a rehearing and to reconsider its position on eyewitness identification testimony.

Penalty Phase
Refusal to Continue Sentencing

In the slip opinion at pages 12 and 13, the Court holds that the granting or denial of a motion for continuance is within the discretion of the trial court; and that any prejudice to Espinosa was the result of his own delay in preparing for the penalty phase of the trial.

Espinosa did ask for more time to prepare for sentencing. However, he also requested monies to bring family members from Guatemala to testify to a history of mental and physical abuse when he was a child. While the thrust of the Court's opinion seems to be the time aspect, we submit that the Court may have overlooked the money aspect of defendant's motion.

The motion alleged that Henry Espinosa had just admitted to counsel for the first time, after his conviction, that he

was subjected to serious physical and mental abuse as a child. Because he was too embarrassed to reveal this painful, intimate information to anyone, he did not tell his attorney earlier. The motion alleged that this information would be the basis for substantial evidence in mitigation for both the jury and the court at the penalty phase.

The motion alleged that Espinosa's mother was the source of the abuse, and requested expense money to arrange for the mother, two brothers and two sisters to obtain visas to travel from Guatemala City to Miami to testify as penalty phase witnesses about Henry Espinosa's alleged history of abuse as a child.

The motion also alleged that there is precedent in Dade County for such a delay in the penalty phase based upon an indigent defendant's claim of substantial mitigating evidence of abuse as a child. In State v. Jesse Ramirez, 85-16798A, Dade Circuit Judge Steven Robinson delayed the penalty phase of the gruesome "duct tape murder" case based upon defense counsel's representation that he had only recently discovered the possibility that Ramirez had been the victim of serious abuse as a child.

Judge Robinson authorized monies for counsel to fly to Colombia to interview relatives and neighbors to develop the

theory of child abuse in mitigation of sentencing. Indeed, in Colombia, counsel confirmed what Ramirez had told him, that he had been not just abused, but tortured as a child.

While the Ramirez jury voted 10 to 2 for death, Judge Robinson overrode the jury recommendation and imposed a sentence of life imprisonment.

The trial court was less than receptive to the motion filed on behalf of Henry Espinosa. In fact, the court found the very request to allow expenses to bring the family from Guatemala to be a "subversion of the system:"

> bringing his family from Guatemala and expending large sums of the Sate's money to do this and notwithstanding your reference to a case that was heard here in Dade County, which I disagree with the rulings of the Judge 100 percent . . .
>
> . . . I do not agree with it.
>
> . . . I don't believe it's the law. I think it's ludicrous. I think I said ridiculous.
>
> It's hitting at the foundations of the American justice system. There never is any finality anymore that deals with death except death itself.
>
> Now, I think we have a great system in this country and I think its' being subverted and this motion is a typical example of that subversion of the system.
>
> * * *
>
> . . . I believe that in the very depths of my heart that that's exactly what it is doing, it's undermining totally our American system of justice.

> And I, for one, will have nothing to do with that and rather than let you continue, because there is no question in my mind, your motion is totally denied.
>
> * * *
>
> . . . you fail to convince me at all because I, wouldn't even allow that testimony [mental and physical abuse as a child] . . . and I'm not spending the money to bring witnesses from Guatemala.
>
> I am not depriving the people of the State of Florida of their hard-earned funds to do this, okay?

In essence then, and with all due respect, by affirming this ruling, the people of the state of Florida are depriving Henry Jose Espinosa of his life, while refusing to spend the funds to allow him to try to defend himself from that ultimate punishment.

When counsel protested that he had just learned the information about Espinosa's abuse as a child, the court said, "I scheduled this [penalty phase] hearing. I'm not going to unschedule it." And when counsel argued that Mr. Espinosa had waited to inform counsel about his history of abuse because he was embarrassed, the court said,

> I'm sure Mr. and Mrs. Rodriguez and Odanis Rodriguez are very interested in his past, okay?
>
> * * *

> Mr. Rodriguez, Mrs. Rodriguez, they become unimportant when the whole system is going down the drain by subversion and I consider this so.
>
> * * *
>
> And if I get reversed, that's fine. I mean, that's the way the system works. I got bosses like everybody else, but I also am entitled to my opinion and I've given it to you.

We respectfully implore the Court to grant a rehearing to reconsider whether Henry Espinosa was entitled to a reasonable delay and a reasonable amount of expense monies for counsel to explore this late-received information and if confirmed, to bring the family from Guatemala to testify. The jury voted 11 to 1 for the death of Henry Jose Espinosa having been deprived of substantial information which very well might have resulted in a recommendation for life.

Refusal to Allow Former Attorney to Testify at Sentencing

The opinion finds no abuse of discretion in the trial court's refusal to allow Assistant Public Defender Diane Ward, one of Henry Espinosa's former attorneys to testify at sentencing, that he is a kind and artistic person.

On this is point it is well to note that the Court may have overlooked the case of Perry v. State, 522 So.2d 817 (Fla. 1988) in which the defendant's former public defender

was allowed to testify about the defendant at the death penalty phase.

In Perry, the jury recommended life imprisonment. The trial court imposed a sentence of death. This Court vacated the death sentence and remanded for imposition of a sentence of life imprisonment with no possibility of parole for twenty-five years. At 522 So.2d 821, this Court described the sentencing hearing and some of the evidence presented:

> An attorney testified that when he first met him in 1982, Perry was a highly motivated and ambitious young man. He said that thereafter Perry's life had gone downhill and that by 1985, Perry viewed himself as a total failure.

On information and belief, the attorney who testified was an assistant public defender who had represented Mr. Perry in the same murder case for about six months, until a conflict was discovered with another defendant who was being represented by the public defender's office on appeal. On information and belief, the state did not object to the attorney testifying.

So while the trial judge in this case said,

> . . . on the basis that [she] was part of the defense team and I know of no situation where lawyers are allowed to come in and testify how nice their former clients were, okay?

there is at least one case which came before this Court on a appeal from a death sentence, in which a former member of the defense team was allowed to testify in mitigation at the death penalty sentencing hearing.

At the hearing in this case, counsel reminded the court that Ms. Ward's testimony was possible mitigation, and that if the jury could see Mr. Espinosa's artistic handiwork they might think twice about recommending the death penalty. Nonetheless, the court ruled

> . . . I don't propose to expand the penalty phase for now or the future every time lawyers get involved with somebody.
>
> * * *
>
> Lawyers are not in that capacity - we are not witnesses. We are advocates and I am not going to put lawyers in the position where they become anything less or more than advocates.

The Court may have overlooked or failed to consider that the state did not object to Diane Ward testifying. The record reflects that the prosecutor took no position on whether or not Henry Espinosa could present Ms. Ward as a witness in mitigation.

It was the other prosecutor, counsel for the co-defendant Beltran, and not the state, who objected to Ms. Ward testifying as a witness for Espinosa.

Beltran's successful opposition to Espinosa's presentation of mitigating testimony and evidence at his sentencing hearing, is yet another compelling reason why a severance was required here.

In any event, the Perry case is an example of testimony at the penalty phase by a former attorney, which was allowed and which resulted in a jury recommendation of life in prison rather than death.

WHEREFORE, based upon the foregoing matters of fact and law which the Court may have overlooked or failed to consider when it issued its opinion, we respectfully pray that the Court will grant a rehearing of this cause and will reverse the conviction and vacate the sentence of death; and in any event, will withdraw the holding at page 11 of the slip opinion relating to the issue of denial of expenses for fingerprint, serology and forensic pathology experts since that issue was improvidently raised.

Respectfully submitted,

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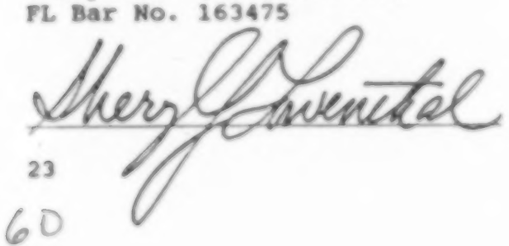

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I HEREBY CERTIFY that a copy of this Motion for Rehearing with Appendix was mailed on July 24, 1991 to Michael Niemand, Assistant Attorney General, Suite N-921, 401 NW Second Avenue, Miami, FL 33128.

Sheryl J. Lowenthal

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Supreme Court of Florida

THURSDAY, NOVEMBER 27, 1991

HENRY JOSE ESPINOSA,

Appellant,

vs.

CASE NO. 73,436

Circuit Court Case No. 86-19790-A (Dade County)

STATE OF FLORIDA,

Appellee.

The Motion for Rehearing, having been considered in light of the revised opinion, is hereby denied.

SHAW, C.J. and OVERTON, McDONALD and GRIMES, JJ., concur.
BARKETT and KOGAN, JJ., dissent.

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.

JB

cc: Marshall Ader, Clerk
Hon. Arthur I. Snyder, Judge
Cheryl J. Lowenthal, Esquire
Michael J. Neimand, Esquire
Fariba N. Komeily, Esquire

By Janie L. Bentley 62
Deputy Clerk

NOV 29 RECD

Richard Jorandby, Public Defender and Eric M. Cumfer, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, on behalf of The Florida Public Denfenders Association, and

Benedict P. Kuehne of Sonnett Sale & Kuehne, P.A., Miami, Florida, on behalf of National Association of Criminal Defense Lawyers, Florida Association of Criminal Defense Lawyers, and Florida Association of Criminal Defense Lawyers - Miami Chapter,

Amici Curiae in support of Appellant's Motion for Rehearing

following comparative examples, which highlight the de facto disproportionality of sentences in capital cases:

A. Robert F. Carr confessed to the sex murders of three Dade County youngsters and was sentenced to three life terms. Arthur Lee Goode confessed to the similar murder of one 10 year old boy in Lee County and was sentenced to death.

B. Ronnie Lee Pouncey of Opa Locka spent almost four hours bashing in the head of a friend, stopping occasionally to munch on raisin bran. He was sentenced to 133 years in prison. Cliffort Hallman angrily slashed the throat of a Tampa barmaid after she slapped him. She died four days later and Tampa General Hospital paid a $40,000 malpractice settlement for its role in her death. Despite the recommendation of the parole board, Hallman is on Death Row.

C. Robert M. Fisher and his wife, Ruby, kidnapped a 21 year old Jacksonville woman from a shopping center. She was raped and stabbed 12 times in the neck. In exchange for testifying against his wife, Fisher received a 10 year sentence for second degree murder. His wife got 15 years, later reduced to five.

D. In Broward County in 1977, the State of Florida prosecuted two individuals for two murder-robbery cases, and the following disproportionate results occurred. In one, 27 year old Scott Tyrell Riles, a white man, was convicted of tying up a young janitor in a Fort Lauderdale restaurant and shooting him fatally in the temple during a robbery. The jury recommended life and the judge agreed.

Four months later, a 27 year old black prison escapee named George V. Franklin was convicted of killing a north Broward liquor store owner during a shootout. The all white jury recommended the death penalty and the same judge who imposed a life sentence on Riles, sentenced Franklin to death.

Prosecutor Kern characterized Riles' crime as

"cold and calculating"; Franklin's as "spur of the moment". Kern explained the disparity, according to the article, by saying: "White youth, white jury. Riles' girlfriend was very pregnant and she sat in the front row crying the whole damn time. A jury is susceptible to that sort of thing."

E. Learie Leo Alford, a son of a West Palm Beach minister, was found guilty of the rape and murder of a 13 year old girl who was on her way to the beach. The victim's nude blindfolded body was found in a Riveria Beach trash pile. Disposition: Alford is on Death Row.

Gary Knopf was convicted of beating a 16 year old Jacksonville girl to death with a board, raping her, then dumping her body in the woods. He plea-bargained for a second degree murder conviction. Disposition: Knopf received 199 years in prison.

F. George Vasil was 15 when he was convicted of killing a 12 year old Fort Pierce girl after raping her and stuffing her panties into her moth. He pleaded innocent. Disposition: Vasil is on Death Row.

Robert Lee Douglas, then 16, pleaded guilty to murdering one elderly Miami Beach woman and raping another. Dade Circuit Judge John Tanksley refused the prosecutor's request for the death penalty. Disposition: Douglas was sentenced to life imprisonment plus 738 years.

G. Harold Gene Lucas, a rejected suitor, opened fire on his girlfriend, Anita Jill Piper, in front of her home. She was killed and two of her friends were wounded. Lucas was captured later in Naples. Disposition: Lucas was sentenced to death.

Joseph Roth, a Miami electrician, was convicted of killing his wife. Trial testimony indicated he waited until she was asleep, then attached one of her arms and legs to a home-built device which he plugged in a light socket. Six months

earlier, Roth has purchased a $20,000 life insurance policy on his wife. He pleaded innocent to the murder. Disposition: because Roth was a first time offender, prosecutors did not seek the death penalty. He was sentenced to life in prison.

H. Patrick Anthony Brewer was found guilty of stabbing a restaurant owner 25 times while trying to rob her. Testimony in the Clay County trial indicated that Brewer, then 18 years of age, was a heavy drug user. The jury recommended the death sentence by a 9-3 vote. Disposition: Brewer is on Death Row.

Stanley Morgan, also known as Frank Holidays, was found guilty of stabbing Suzanne Lustig 19 times during a robbery at Miami International Airport parking lot. Trial testimony showed Morgan was a heroin user. The jury recommended mercy. Circuit Judge Natalie Baskin agreed. Disposition: Morgan was sentenced to a life imprisonment.

I. Charles Proffitt, then 27 years of age, was charged with breaking into Moel Medgebow's home and stabbing him to death during an early morning robbery. He pleaded innocent in a Hillsborough County Court. Disposition: Propffitt was sent to Death Row.

Preston Shands, Jr. confessed to murdering Miami Springs motel manager Ramon Nieves-Guirao who was hacked, stabbed and gored with an ornamental wood. Shands, then 19, pleaded guilty to a second degree murder. Disposition: He was sentenced to 114 years in prison.

J. Jacob Dougan, Jr., Elwood Barclay and two friends calling themselves the Black Liberation Army picked up a white hitchhiker in Jacksonville, drove him to a trash dump and stabbed him repeatedly. Stephen Orlando was then shot twice in the head as he begged for mercy. The murderers later sent a tape recording to a radio station proclaiming racial war. They also sent a tape to Orlando's mother that said, "I loved watching the

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CASE NO. 91-7390

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HENRY JOSE ESPINOSA

Petitioner,

vs

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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COUNSEL FOR RESPONDENT

QUESTION PRESENTED

The questions presented as set forth in the petition (at i) are:

I.

WHETHER HENRY ESPINOSA WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHERE THE RECORD SHOWS THAT HIS REPEATED MOTIONS FOR SEVERANCE WERE DENIED, AND AT A JOINT TRIAL WITH CO-DEFENDANT BELTRAN, BELTRAN'S COUNSEL WAS SO ANTAGONISTIC, THAT HE RELIEVED THE STATE OF MUCH OF ITS BURDEN TO PROVE THE CASE BEYOND A REASONABLE DOUBT, BY GOING BEYOND EXCULPATING HIS OWN CLIENT BELTRAN, AND VICIOUSLY BLAMING ESPINOSA FOR THE CRIME, TO THE EXTENT THAT HE ACTIVELY AND EFFECTIVELY PROSECUTED ESPINOSA EVERY BIT AS VIGOROUSLY AS THE PROSECUTOR?

II.

WHETHER THE TRIAL COURT FAILED TO PROPERLY LIMIT THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS AND CRUEL IN VIOLATION OF, AND IN CONFLICT WITH PROFITT V. FLORIDA AND MAYNARD V. CARTWRIGHT?

III.

WHETHER THE SUPREME COURT OF FLORIDA IMPROPERLY AFFIRMED ESPINOSA'S DEATH SENTENCE WHERE THE RECORD SHOWED THAT HE WAS DEPRIVED OF SUFFICIENT TIME AND FUNDS TO ADEQUATELY AND EFFECTIVELY DEFEND HIMSELF AGAINST A DEATH SENTENCE, IN VIOLATION OF ALL GUARANTEES OF FAIRNESS, JUSTICE AND DUE PROCESS; AND THAT THE IMPOSITION OF THE DEATH SENTENCE DEPRIVED ESPINOSA OF DUE PROCESS AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

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IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 91-7390

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Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 589 So.2d 887 (Fla. 1991) (Pet. App. A).

The opinion of the Supreme Court of Florida in the co-defendant's case is reported at 583 So.2d 1030 (Fla. 1991). (Pet. App. B).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent, State of Florida (the "State") notes that the Petitioner's statement of constitutional and statutory provisions lists applicable constitutional provision, to wit: the Fifth, Sixth, Eighth and Fourteenth Amendments

STATEMENT OF THE CASE

Petitioner, **Henry Jose Espinosa** ("Espinosa") was found guilty of first degree murder, second degree murder, attempted first degree murder, grand theft and burglary. Espinosa v. State, 583 So.2d 887 (Fla. 1991). Following the penalty phase of the trial, the jury recommended the imposition of the death penalty for the first degree murder. The trial court, followed the recommendation, and imposed the death penalty. Id.

On direct appeal to the Supreme Court of Florida, that Court affirmed the convictions and the imposition of the death penalty. Id. at 894. The Supreme Court of Florida summarizes the basic facts of the case:

Espinosa was tried together with his codefendant, Mauricio Beltran-Lopez. The state introduced evidence showing that the murders were committed in the following manner. At one time Espinosa had been neighbors with Bernardo and Teresa Rodriguez and their daughters, Odenia and Odanis. On the night of the murders, Espinosa and Beltran-Lopez went to the Rodriguezes' home. A violent struggle ensued in the kitchen during which the defendants shot and stabbed Bernardo Rodriguez to death. The defendants then grabbed Teresa Rodriguez and dragged her to the master bedroom where apparently Beltran-Lopez suffocated her with a pillow while Espinosa repeatedly stabbed her. The defendants then went to Odanis's room which was locked. Espinosa lured her out by telling her that her mother wanted her. When Odanis opened the door, Beltran-Lopez grabbed her while Espinosa repeatedly stabbed her. The defendants then left, taking some money with them. Odanis's sister, Odenia, telephoned a family friend who came and took the sisters to the hospital.

At the trial Odanis, who was eleven years old at the time of the murders, testified that during the early morning hours of July 10, 1986, she was in her room and heard her mother's and Espinosa's voices. Odanis recognized Espinosa's voice since he had been her neighbor. The telephone in her room rang and a man, who she later identified as Beltran-Lopez, came into her room, pulled the telephone cord from the wall, and left. Odanis then opened her door and saw Espinosa holding a knife while Beltran-Lopez held her mother. Her mother signalled her, so she went back into her room and locked the door. She then heard her mother say, "Don't, Henry, don't." Espinosa then came to her door and told her that her mother wanted her. When she opened the door, Beltran-Lopez grabbed her and Espinosa started stabbing her. Later, at the hospital, Odanis

identified Espinosa and Beltran-Lopez as the assailants from photographic lineups.

Odenia, who was twelve years old at the time of the murders, testified that she had heard her mother tell Espinosa that if he would leave she would not call the police. She also heard Espinosa call Odanis out of her room. She, too, had recognized Espinosa's voice because he had been their neighbor, and she had picked his picture out of a photographic lineup.

The medical examiner testified that Bernardo had been shot once and stabbed six times. Teresa had been smothered with a pillow, stabbed six times, and strangled while she was alive. The parties stipulated that Odanis was stabbed sixteen times. A fingerprint expert testified that a bloody palm print from the refrigerator was Beltran-Lopez's and a bloody fingerprint was Espinosa's. Beltran-Lopez's bloody prints were also found on a chair cover. A serologist testified that blood consistent with Beltran-Lopez's blood, from a wound to his hand, was found in several areas of the house. The serologist also testified that blood consistent with Teresa and Odanis's blood was found spattered on a pair of shorts in Espinosa's car. A Ms. Lanza, with whom Beltran-Lopez had been staying, testified that Beltran-Lopez and Espinosa brought a pack of money to her house after the murders and asked her to keep it for them, telling her it was a loan. Specks of blood were found on the money.

Espinosa, himself, testified at the trial that Bernardo had hired him to drive trucks. On the night of the murders, Espinosa and Beltran-Lopez went to the Rodriguezes' house to pick up the trucks. Bernardo then asked them to haul marijuana, but Espinosa refused. Bernardo then threatened Espinosa, and Teresa came out into the kitchen and pointed a gun at Espinosa. Beltran-Lopez

then grabbed the gun and Bernardo grabbed a knife. Beltran-Lopez then shot Bernardo and the two of them began struggling violently. Beltran-Lopez kicked and stabbed Bernardo to death. Espinosa testified that Betran-Lopez next killed Teresa and then attempted to kill Odanis. Espinosa further claimed to have taken almost no active part of the killing with the exception of stabbing Odanis once with the intention of making Beltran-Lopez think Odanis was dead so that he would leave her alone.

Espinosa also presented evidence at the trial that Bernardo Rodriguez was involved in drug trafficking. A police officer testified that a car parked in the Rodriguezes' driveway was registered to a Maria Castellanos. When the police went to her house in the course of the murder investigation, they seized over a thousand pounds of marijuana and some marijuana-trafficking equipment. They also found a dump truck at Castellanos's house similar to one parked at the Rodriguezes' house. Further, a beeper found on a man who attempted to flee Castellanos's house bore the same telephone number as a beeper found in the Rodriguezes' kitchen. A fingerprint expert testified that Bernardo Rodriguez's fingerprints were found on a cigarette pack in the car and on a candleholder in Castellanos's house.

Beltran-Lopez did not testify during the guilt phase of the trial. The jury ultimately found both defendants guilty.

During the penalty phase of the trial, Espinosa presented several character witnesses who testified that he was a good person. Espinosa also made a statement on his own behalf. Beltran-Lopez also testified, stating that after he was arrested he had given a statement to the police concerning his involvement in the murders. He largely blamed the murders on Espinosa, admitting to only minimal participation. He did admit that

> he had stolen money from the house. Beltran-Lopez's mother testified that he was a good son.

Id. at 889-891.

The jury recommended by an eleven to one vote that Espinosa be sentenced to death. The judge then sentenced Espinosa to death, finding in aggravation that (1) he previously had been convicted of a violent felony; (2) the murder was committed to prevent lawful arrest; (3) the murder was committed during an armed burglary; and (4) the murder was especially heinous, atrocious or cruel. The judge found statutory mitigation of no significant criminal history and nonstatutory mitigation that Espinosa was a good man. Id. at 891.

The jury recommended the death penalty for the codefendant by an eight to four vote. The judge then sentenced the codefendant to death, finding in aggravation that (1) he previously had been convicted of a violent felony; (2) the murder was committed to prevent lawful arrest; (3) the murder was committed during an armed burglary; and (4) the murder was especially heinous, atrocious or cruel. The judge found statutory mitigation of no significant criminal history and nonstatutory mitigation that he was a good son. 583 So.2d at 1031.

In the direct appeal, the Supreme Court of Florida affirmed the conviction and sentence of death. 589 So.2d at 894. The Court rejected Espinosa's claim that he was entitled to have his trial severed from the codefendant. The Court noted McCray v. State, 416 So.2d 804 (Fla. 1982) states that severance is not required simply because codefendants blame each other for the crime. The key is that each defendant has the opportunity to cross-examine the other if the other chooses to testify. Id. at 891-892. The Court held:

> Under this standard, Espinosa and Beltran-Lopez were clearly not entitled to separate trials. The fact that Espinosa testified at trial and was subject to examination by Beltran-Lopez's attorney is not a sufficient reason to grant severance. Further, Espinosa was not prejudiced by an inability to cross-examine Beltran-Lopez during the guilt phase since Beltran-Lopez did not testify and the state did not attempt to introduce Beltran-Lopez's confession. Beltran-Lopez did testify during the penalty phase, but Espinosa was able to cross-examine him. No evidence was introduced in this trial that could not have been introduced against either Espinosa or Beltran-Lopez if either had been tried alone. Therefore, we find that Espinosa and Beltran-Lopez were not entitled to a severance.

Id. at 892.

The Florida Supreme Court also rejected Espinosa's contention that the aggravating circumstances of heinous,

atrocious or cruel was unconstitutionally vague under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1053, 100 L.Ed.2d 372 (1988). Id at 894.

REASON FOR DENYING THE WRIT

I.

THE DENIAL OF SEVERANCE DID NOT RESULT IN AN UNFAIR TRIAL WHERE THE EVIDENCE WAS NOT CONFUSING OR PREJUDICIAL.

Espinosa contends that his trial was fundamentally unfair because it was not severed from his codefendant. The trial was unfair, it is contended, because the defenses were irreconcilable and antagonistic and because the joint trial precluded Espinosa from presenting his entire defense.

The contention of irreconcilable and antagonistic defenses lacks support from the record. Espinosa's defense at trial, was that the victim had hired him to drive trucks. On the night of the incident Espinosa and his codefendant went to the victim's house to pick up the trucks. At that pcint the victim asked him to haul marijuana. When Espinosa refused, the victims tried to force Espinosa by threatening him with a gun. At that point the codefendant grabbed for the gun, and killed one of the victims. Espinosa then testified that his codefendant killed the other victim as well as perpetrated the attempted murder. He claimed that he did not have an active role in the killings. Espinosa buttressed the marijuana defense by claiming that the victim was involved in trafficking of marijuana.

Although, the codefendant did not testify at the guilt/innocence part of the trial, he did testify at the penalty phase. The codefendant blamed the murders on Espinosa, admitting to only minimal participation.

The historical facts as summarized by the Florida Supreme Court in its decision, reflect that the victim was stabbed and effectually suffocated by a pillow. The victim's daughter testified that she saw the codefendant hold her mother while Espinosa was stabbing her with a knife. The codefendant suffered a knife wound on his hand and his blood was found all over the house. Espinosa's fingerprint was found in blood and blood consistent with the victim's and her daughter was found on Espinosa's shorts. Espinosa and his codefendant turned over blood stained money to friends for safe keeping.

Based on the foregoing, this case was the classic one for a joint trial. Richardson v. Marsh, 481 U.S. 200, 210, 107 S.Ct. 1702, 95 L.Ed.2d 170 (1987):

> . . . Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability-advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

The Florida Supreme Court in affirming the denial of severance specifically relied on these factors. 589 So.2d at 892. Espinosa and his codefendant blamed each other for the murders. Clearly the jury was properly given the task of determining credibility and culpability. Here the jury believed only the eyewitness' and physical evidence and discredited both Defendant's version of the facts. Therefore the joint trail served its purpose to ensure that all the evidence would be considered and consistent verdicts would be entered.

Espinosa's second contention that the joint trial precluded him from presenting his entire defense is based on the fact that he was not allowed to present evidence of his codefendant's violent propensities. Specifically, he wanted to show that his codefendant had a history of violent behavior when he lived in Nicaragua. He contends that this would have supported his defense that the codefendant flew into a rage during the argument and he killed the victims.

The Florida Supreme Court was presented with the claim and rejected it on the ground the evidence was inadmissible, regardless of whether the trial was joint or separate, since all it established was that the codefendant generally had a violent disorder.

> We reject these claims. The evidence of Beltran-Lopez's violent history is clearly inadmissible under section

> 90.404, Florida Statutes (1987). If Espinosa's intention was to show that Beltran-Lopez had a generally violent character, then the evidence was inadmissible under section 90.404(1). That section states that "[e]vidence of a person's character or a trait of his character is admissible to prove that he acted in conformity with it on a particular occasion." This general rule has several exceptions, none of which applies to this evidence. If Espinosa intended to present the evidence as similar fact evidence of other crimes, wrongs, or acts, then the evidence was inadmissible under section 90.404(2)(a) since it clearly would be offered solely to prove Beltran-Lopez's bad character or propensity.

Based on the foregoing, Espinosa received a fair trial and the denial of severance did not result in a deprivation of his constitutional rights.

II.

THE FLORIDA SUPREME COURT HAS NOT APPLIED THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS OR CRUEL IN AN OVERBROAD MANNER.

Espinosa contends that Florida's aggravating circumstance of heinous, atrocious or cruel violates this Court's decision in Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). More specifically, he contends that the jury instruction is overbroad and since no explanation of the term is given to the jury, it is violative of the Eighth Amendment.

The Florida Supreme Court has addressed the issue of the nonapplicability of Maynard to Florida's capital sentencing process in Smalley v. State, 546 So.2d 720 (Fla. 1989). The court therein held that the decision in Maynard, which related to Oklahoma's capital sentencing scheme, does not apply in Florida, because in Florida the trial court, not the jury, is the actual sentencer and because the Florida Supreme Court has adopted and consistently applied a limiting construction of the aggravating circumstance of heinous, atrocious and cruel. The Florida Supreme Court reasoned further:

> This Court has narrowly construed the phase "especially heinous, atrocious, or cruel" so that it has more precise meaning than the same phrase has in Oklahoma. In *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), we said:
>
> > It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> It was because of this narrowing construction that the Supreme Court of

> the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in *Profitt v. Florida*, 428 U.S. 24, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. E.g., *Garron v. State*, 528 So.2d 353 (Fla. 1988); *Jackson v. State*, 502 So.2d 409 (Fla. 1986), *cert. denied*, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); *Jackson v. State*, 498 So.2d 906 (Fla. 1986); *Teffeteller v. State*, 439 So.2d 840 (Fla. 1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That *Proffitt* continues to be good law today is evident from *Maynard v. Cartwright*, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. *See Maynard v. Cartwright*, 108 S.Ct. at 1859.
>
> Id. at 722.

Espinosa's contention therefore must be rejected since the application heinous, atrocious or cruel is strictly limited and strictly enforced to those crimes which are conscienceless or pitiless and which are unnecessarily tortuous to the victim. Therefore it does not violate the Eighth Amendment.

III.

THE SENTENCE OF DEATH WAS IMPOSED IN ACCORDANCE WITH DUE PROCESS OF LAW.

Espinosa first claims that he was denied a continuance to prepare for the penalty phase. The Florida Supreme Court rejected this claim as follows:

> Turning to the penalty phase of the trial, Espinosa first claims that he was denied the time and money necessary to present mitigating evidence by flying in several of Espinosa's family members from Central America to testify to a history of mental and physical child abuse. Counsel claims that he did not make the motion to bring them to the United States until the beginning of the penalty phase because Espinosa had been embarrassed to tell him about the abuse until the penalty phase was imminent. Espinosa also claims that the judge should have granted him a delay to obtain new counsel for the penalty phase to his trial. Espinosa wanted to be represented by an experienced death-penalty lawyer from Texas, and he informed his counsel of his desire at the end of the guilt phase.
>
> Espinosa and his counsel were aware for several months that the state would seek the death penalty. On the first day of the trial, the trial judge informed Espinosa and his attorney that he would begin the penalty phase of the trial approximately two hours after the jury returned its verdicts. Espinosa's counsel agreed to the procedure. "The granting or denial of a motion for continuance is within the discretion of the trial court." *William v. State*, 438 So.2d 781, 785 (Fla. 1983), *cert. denied*, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 146 (1984). The trial judge did not abuse his discretion. Any prejudice to Espinosa was a result of his own delay in preparing for the penalty phase of the trial.

589 So.2d at 893.

Based on the foregoing facts, the denial of the continuance did not violate Espinosa's due process rights. This Court addressed this in Ungar v. Sarafite, 376 U.S. 575, 589 (1964):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. (Citations omitted).

When a motion for a continuance for the purpose of securing witness is denied a key factor in the determination is whether due diligence was used to secure the witness. United States v. Upton, 531 F.2d 1281 (5th Cir. 1976).

Applying the foregoing to the instant case it to clear that Espinosa's lack of due diligence resulted in the delay in preparing for the penalty phase. As such the denial of the continuance did not deny him due process of law.

Espinosa's next contention which in any way touches upon due process, is that his death sentence was disproportionate. A defendant is afforded due process when a State court does a proportionality review. He does not have due process claim on the ground that the State court's proportionately review is not to his liking. Solomon v. Kemp, 735 F.2d 395 (11th Cir. 1984).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HENRY JOSE ESPINOSA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX TO BRIEF OF RESPONDENT IN OPPOSITION

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COUNSEL FOR RESPONDENT

the evidence, finds the facts upon which the decision to terminate parental rights was based are .....

.....

Upon the foregoing, the court finds that it is manifestly in the best interest of the child(ren) to terminate parental rights and place the child(ren) in the custody of ... (agency) ... for subsequent adoption.

IT IS ORDERED that the parental rights of ..... (name(s)) ..... to the subject child(ren) ... is/are ... terminated, and

IT IS, FURTHER, ORDERED that the child(ren) ... is/are ... hereby adjudged to be a dependent child(ren); that the child(ren) ... is/are ... hereby placed in the custody of ..... (agency) ..... for subsequent ADOPTION.

ORDERED at ....., ... County, Florida, ... (date)....

Circuit Judge

FORM 8.984. JUDGMENT OF VOLUNTARY TERMINATION OF PARENTAL RIGHTS

JUDGMENT OF VOLUNTARY TERMINATION OF PARENTAL RIGHTS

This cause came on to be heard on the petition of ..... (name) ..... for termination of parental rights. The court having heard the testimony and received the evidence finds by clear and convincing evidence as follows:

1. The subject child(ren), ... (name(s)) ....., born .... (date(s)) ...., verification of which being filed herein, ... is/are ... within the jurisdiction of this court.

2. The subject child(ren) remain(s) dependent ... he/she/they ... ... has/have ... been surrendered by ..... (name(s)) ....., ... (relationship) ... of said child(ren), who placed the child(ren) on or about .... (date).... with .... (agency).... and waived notice of this hearing, said waiver being filed herein. The court finds this placement to be voluntary.

3. It is manifestly in the best interest of the child(ren) to terminate ... his/her ... parental rights and to place the child(ren) in the custody of ..... (agency) ..... for subsequent adoption.

IT IS ORDERED that the parental rights of ..... (name(s)) ..... to the subject child(ren) are terminated, and

IT IS, FURTHER, ORDERED that the child(ren) ... is/are ... hereby adjudged to be dependent and ... is/are ... hereby placed in the custody of ..... (agency) ..... for subsequent ADOPTION.

ORDERED at ....., ... County, Florida, ... (date)....

Circuit Judge

Henry Jose ESPINOSA, Appellant,

v.

STATE of Florida, Appellee.

No. 73436.

Supreme Court of Florida.

July 11, 1991.

Rehearing Denied Nov. 27, 1991.

Defendant was convicted of first-degree murder, second-degree murder, attempted murder, grand theft, and burglary and sentenced to death after joint jury trial in the Circuit Court, Dade County, Arthur I. Snyder, J. Defendant appealed. The Supreme Court held that: (1) defenses were not sufficiently antagonistic so as to require severance; (2) attempted murder of third victim was part of same criminal episode in which her parents were murdered and as such was properly joined with other counts for trial; (3) any error in refusing to permit evidence of victim's conviction for federal drug offense was harmless; (4) trial court did not abuse its discretion in denying a defendant time and money necessary to fly in family members from Central America to testify to history of mental and physical child abuse during penalty phase of trial; (5) trial court properly found aggravating factor of prior violent-felony conviction with respect to second victim's murder based on defendant's conviction for first victim's murder; and (6) trial court's finding that heinous, atrocious, or cruel aggravating factor applied to murder of second victim was supported by medical examiner's testimony.

Affirmed.

Barkett, J., dissented and filed opinion in which Kogan, J., concurred.

Kogan, J., dissented and filed opinion.

1. Criminal Law ⇐622.2(5)

Defenses were not sufficiently antagonistic so as to require severance in trial on charges of murder, attempted murder, grand theft and burglary. West's F.S.A. RCrP Rule 3.152.

2. Criminal Law ⇐622.2(1)

Fact that defendant testified at trial and was subject to examination by codefendant's attorney was not sufficient reason to grant severance. West's F.S.A. RCrP Rule 3.152.

3. Criminal Law ⇐622.2(10)

Defendant was not prejudiced by inability to cross-examine codefendant during guilt phase of murder trial so as to require severance since codefendant did not testify and State did not attempt to introduce codefendant's confession; although codefendant did testify during penalty phase, defendant was able to cross-examine codefendant. West's F.S.A. RCrP Rule 3.152.

4. Criminal Law ⇐620(6)

Attempted murder of victim was part of same single criminal episode in which her parents were murdered and as such was properly joined with other counts for trial; facts surrounding attempted murder, victim's testimony recounting events of that night, and her ability to identify defendants were integral part of prosecution's case concerning her parents' murders. West's F.S.A. RCrP Rule 3.152(a)(2)(i).

5. Homicide ⇐178(1)

Evidence of codefendant's violent history was inadmissible to show that codefendant had generally violent character and to prove that he acted in conformity with it on occasion of murders. West's F.S.A. § 90.404(1).

6. Criminal Law ⇐369.1

Evidence of codefendant's violent history was inadmissible as similar fact evidence of other crimes, wrongs, or acts since it clearly would be offered solely to prove codefendant's bad character or propensity. West's F.S.A. § 90.404(2)(a).

7. Homicide ⇐171(1), 339

Any error in refusing to admit evidence of murder victim's conviction for federal drug offense to support defendant's story that murder of victims was precipitated by argument over transporting drugs was harmless, where defendant was allowed to present testimony of police officer of evidence linking victim to drug seizure at third-party's house, and victim's involvement in drug trade was, at most, peripheral issue with respect to whether defendant was guilty of murder. West's F.S.A. § 90.404(1)(b)1.

8. Costs ⇐302.2(2)

Trial court did not abuse its discretion in refusing to authorize costs for expert testimony with respect to reliability of eyewitness identification in murder trial.

9. Criminal Law ⇐388(2)

Trial court did not abuse its discretion in allowing serologist to testify to 1979 statistics on demographics of blood types, where trial court thoroughly considered relevance of statistics before admitting them and defense counsel was able to effectively cross-examine serologist as to statistics' reliability.

10. Costs ⇐302.2(1)

Trial judge did not abuse its discretion in refusing to permit defendant time and money necessary to present mitigating evidence at penalty phase of murder trial by flying in family members from Central America to testify to history of mental and physical child abuse, where defendant failed to make motion until beginning of penalty phase, despite his awareness for several months that State would seek death penalty.

11. Criminal Law ⇐675
Witnesses ⇐37(4)

Refusing to allow one of defendant's former attorneys, a public defender, to testify that defendant was a kind, artistic person was not abuse of discretion, where testimony would have been based on attorney's observations while representing defendant earlier in same case, and defendant was allowed to present five other character witnesses on his behalf.

12. Homicide ⇐358(1)

Trial court did not abuse its discretion in limiting defendant's testimony during penalty phase, where testimony was largely disjointed narrative in which defendant continued to argue his innocence and defendant had testified extensively during guilt phase.

13. Homicide ⇐357(5)

Trial court properly found aggravating factor of prior violent-felony conviction with respect to second victim's murder based on defendant's conviction for murder of first victim during same incident. West's F.S.A. § 921.141(5)(b, d, e, h).

14. Homicide ⇐357(8)

Evidence was sufficient to support trial court's finding in penalty phase that victim's murder was committed to avoid arrest since victim could identify defendants as having murdered husband. West's F.S.A. § 921.141(5)(b, d, e, h).

15. Homicide ⇐358(1)

Attempted murder of victim's child could properly be considered in support of aggravating factor that defendant had committed murder of victim to avoid arrest, where defendants attempted to stab child to death after she had seen them in kitchen during same criminal episode. West's F.S.A. § 921.141(5)(b, d, e, h).

16. Homicide ⇐357(11)

Trial judge's finding that heinous, atrocious, or cruel aggravating factor applied to murder of victim was supported by medical examiner's testimony that victim was alive while she was being strangled and repeatedly stabbed, and jury was not improperly influenced by evidence of attempted murder of victim's 11-year-old daughter. West's F.S.A. § 921.141(5)(b, d, e, h).

Sheryl J. Lowenthal, Sp. Asst. Public Defender, Coral Gables, for appellant.

Robert A. Butterworth, Atty. Gen. and Michael J. Neimand, Asst. Atty. Gen., Miami, for appellee.

PER CURIAM.

Henry Jose Espinosa appeals to this Court to review his conviction and sentence of death for the first-degree murder of Teresa Rodriguez. Espinosa additionally appeals his convictions for the second-degree murder of Bernardo Rodriguez, the attempted murder of Odanis Rodriguez, grand theft, and burglary. We have jurisdiction pursuant to article V, section 3(b)(1), of the Florida Constitution.

Espinosa was tried together with his co-defendant, Mauricio Beltran-Lopez. The state introduced evidence showing that the murders were committed in the following manner. At one time Espinosa had been neighbors with Bernardo and Teresa Rodriguez and their daughters, Odenia and Odanis. On the night of the murders, Espinosa and Beltran-Lopez went to the Rodrigueses' home. A violent struggle ensued in the kitchen during which the defendants shot and stabbed Bernardo Rodriguez to death. The defendants then grabbed Teresa Rodrigues and dragged her to the master bedroom where apparently Beltran-Lopez suffocated her with a pillow while Espinosa repeatedly stabbed her. The defendants then went to Odanis's room which

was locked. Espinosa lured her out by telling her that her mother wanted her. When Odanis opened the door, Beltran-Lopez grabbed her while Espinosa repeatedly stabbed her. The defendants then left, taking some money with them. Odanis's sister, Odenia, telephoned a family friend who came and took the sisters to the hospital.

At the trial Odanis, who was eleven years old at the time of the murders, testified that during the early morning hours of July 10, 1986, she was in her room and heard her mother's and Espinosa's voices. Odanis recognized Espinosa's voice since he had been her neighbor. The telephone in her room rang and a man, whom she later identified as Beltran-Lopez, came into her room, pulled the telephone cord from the wall, and left. Odanis then opened her door and saw Espinosa holding a knife while Beltran-Lopez held her mother. Her mother signalled her, so she went back into her room and locked the door. She then heard her mother say, "Don't, Henry, don't." Espinosa then came to her door and told her that her mother wanted her. When she opened the door, Beltran-Lopez grabbed her and Espinosa started stabbing her. Later, at the hospital, Odanis identified Espinosa and Beltran-Lopez as the assailants from photographic lineups.

Odenia, who was twelve years old at the time of the murders, testified that she had heard her mother tell Espinosa that if he would leave she would not call the police. She also heard Espinosa call Odanis out of her room. She, too, had recognized Espinosa's voice because he had been their neighbor, and she had picked his picture out of a photographic lineup.

The medical examiner testified that Bernardo had been shot once and stabbed six times. Teresa had been smothered with a pillow, stabbed six times, and strangled while she was alive. The parties stipulated that Odanis was stabbed sixteen times. A fingerprint expert testified that a bloody palm print from the refrigerator was Beltran-Lopez's and a bloody fingerprint was Espinosa's. Beltran-Lopez's bloody prints were also found on a chair cover. A serologist testified that blood consistent with Beltran-Lopez's blood, from a wound to his hand, was found in several areas of the house. The serologist also testified that blood consistent with Teresa and Odanis's blood was found spattered on a pair of shorts in Espinosa's car. A Ms. Lanza, with whom Beltran-Lopez had been staying, testified that Beltran-Lopez and Espinosa brought a pack of money to her house after the murders and asked her to keep it for them, telling her it was a loan. Specks of blood were found on the money.

Espinosa, himself, testified at the trial that Bernardo had hired him to drive trucks. On the night of the murders, Espinosa and Beltran-Lopez went to the Rodrigueses' house to pick up the trucks. Bernardo then asked them to haul marijuana, but Espinosa refused. Bernardo then threatened Espinosa, and Teresa came out into the kitchen and pointed a gun at Espinosa. Beltran-Lopez then grabbed the gun and Bernardo grabbed a knife. Beltran-Lopez then shot Bernardo and the two of them began struggling violently. Beltran-Lopez kicked and stabbed Bernardo to death. Espinosa testified that Beltran-Lopez next killed Teresa and then attempted to kill Odanis. Espinosa further claimed to have taken almost no active part in the killing with the exception of stabbing Odanis once with the intention of making Beltran-Lopez think Odanis was dead so that he would leave her alone.

Espinosa also presented evidence at the trial that Bernardo Rodriguez was involved in drug trafficking. A police officer testified that a car parked in the Rodrigueses' driveway was registered to a Maria Castellanos. When the police went to her house in the course of the murder investigation, they seized over a thousand pounds of marijuana and some marijuana-trafficking equipment. They also found a dump truck at Castellanos's house similar to one parked at the Rodrigueses' house. Further, a beeper found on a man who attempted to flee Castellanos's house bore the same telephone number as a beeper found in the Rodrigueses' kitchen. A fingerprint expert testified that Bernardo Rodriguez's fingerprints were found on a

cigarette pack in the car and on a candleholder in Castellanos's house.

Beltran-Lopez did not testify during the guilt phase of the trial. The jury ultimately found both defendants guilty.

During the penalty phase of the trial, Espinosa presented several character witnesses who testified that he was a good person. Espinosa also made a statement on his own behalf. Beltran-Lopez also testified, stating that after he was arrested he had given a statement to the police concerning his involvement in the murders. He largely blamed the murders on Espinosa, admitting to only minimal participation. He did admit that he had stolen money from the house. Beltran-Lopez's mother testified that he was a good son.

The jury recommended the death penalty for Espinosa by an eleven-to-one vote.[1] The judge then sentenced Espinosa to death, finding in aggravation that (1) he previously had been convicted of a violent felony; (2) the murder was committed to prevent lawful arrest; (3) the murder was committed during armed burglary; and (4) the murder was especially heinous, atrocious, or cruel.[2] The judge found statutory mitigation of no significant criminal history and nonstatutory mitigation that Espinosa was a good man. Espinosa was additionally sentenced to life with a statutory three-year minimum for the second-degree murder, life for the attempted murder, five years for grand theft, and life with a three-year minimum for the armed burglary.

[1] Espinosa's first claim in this appeal is that the trial court should have granted Espinosa's motion to have his trial severed from that of Beltran-Lopez. He claims that their defenses were sufficiently antagonistic so that the trial court should have granted severance under rule 3.152 of the Florida Rules of Criminal Procedure.

[2, 3] As this Court has previously stated:

> Rule 3.152(b)(1) directs the trial court to order severance whenever necessary "to promote a fair determination of the guilt or innocence of one or more defendants. . . ." As we stated in *Menendez v. State*, 368 So.2d 1278 (Fla.1979), and in *Crum v. State*, 398 So.2d 810 (Fla.1981), this rule is consistent with the American Bar Association standards relating to joinder and severance in criminal trials. The object of the rule is not to provide defendants with an absolute right, upon request, to separate trials when they blame each other for the crime. Rather, the rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants. A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).
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> In situations less obviously prejudicial than the *Bruton* circumstance, the question of whether severance should be granted must necessarily be answered on a case by case basis. Some general rules have, however, been established. Specifically, the fact that the defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to a severance. *United States v. Cravero*, 545 F.2d 406 (5th Cir.1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977); *United States v. Perez*, 489 F.2d 51 (5th Cir.1973), *cert. denied*, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). Nor is hostility among defendants, or an attempt by one defendant to escape punishment by throwing the blame on a codefendant, a sufficient reason, by itself, to require severance. *United States v. Herring*, 602 F.2d 1220 (5th Cir.), *cert. denied*, 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 732 (1979); *United States v. Ehrlichman*, 546 F.2d 910 (D.C.Cir. 1976), *cert. denied*, 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 570 (1977); *Perez-Hawkins v. State*, 199 So.2d 276 (Fla. 1967), *vacated on other grounds*, 408 U.S. 941, 92 S.Ct. 2857, 33 L.Ed.2d 765 (1972). If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter. As in this case, the defendants are confronting each other and are subject to cross-examination upon testifying, thus affording the jury access to all relevant facts.

McCray v. State, 416 So.2d 804, 806 (Fla. 1982) (footnotes omitted). Under this standard, Espinosa and Beltran-Lopez were clearly not entitled to separate trials. The fact that Espinosa testified at trial and was subject to examination by Beltran-Lopez's attorney is not a sufficient reason to grant severance. Further, Espinosa was not prejudiced by an inability to cross-examine Beltran-Lopez during the guilt phase since Beltran-Lopez did not testify and the state did not attempt to introduce Beltran-Lopez's confession. Beltran-Lopez did testify during the penalty phase, but Espinosa was able to cross-examine him. No evidence was introduced in this trial that could not have been introduced against either Espinosa or Beltran-Lopez if either had been tried alone. Therefore, we find that Espinosa and Beltran-Lopez were not entitled to a severance.

[4] Espinosa additionally claims that the count charging him with the attempted murder of Odanis should have been severed from the other counts against him. He argues that rule 3.152(a)(2)(i) provides for severance here to promote a fair determination of his guilt on each count. He argues that he could not get a fair determination by combining the counts because he did not want to testify about Odanis's stabbing and because during the penalty phase the jury could not separate the stabbing of the eleven-year-old girl from her mother's murder.

We also reject this claim. The attempted murder of Odanis was part of the same single criminal episode in which her parents were murdered and as such was properly joined with the other counts. *See Wuornos v. Poyck*, 564 So.2d 1066 (Fla.1990), *cert. denied*, — U.S. —, 111 S.Ct. 1338, 113 L.Ed.2d 270 (1991). The facts surrounding Odanis's attempted murder, Odanis's testimony recounting the events of that night, and her ability to identify Espinosa and Beltran-Lopez were an integral part of the prosecution's case concerning her parents' murders.

[5] Espinosa next claims that the trial court should have allowed him to introduce evidence that Beltran-Lopez had a history of violent behavior when he lived in Nicaragua. Espinosa argues that this would have supported his defense that Beltran-Lopez flew into a rage during an argument with Bernardo Rodriguez and killed the Rodrigueses. Espinosa also argues that he should have been allowed to introduce evidence of Bernardo Rodriguez's conviction for a federal drug offense since that would have supported his assertion that the murders were precipitated by an argument over hauling marijuana.

[6] We reject these claims. The evidence of Beltran-Lopez's violent history is clearly inadmissible under section 90.404, Florida Statutes (1987). If Espinosa's intention was to show that Beltran-Lopez had a generally violent character, then the evidence was inadmissible under section 90.404(1). That section states that "[e]vidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion." This general rule has several exceptions, none of which applies to this evidence. If Espinosa intended to present

1. The jury recommended the death penalty for Beltran-Lopez by an eight-to-four vote, and he, too, was sentenced to death.

2. § 921.141(5)(b), (d), (e), (h), Fla.Stat. (1985).

the evidence as similar fact evidence of other crimes, wrongs, or acts, then the evidence was inadmissible under section 90.404(2)(a) since it clearly would be offered solely to prove Beltran-Lopez's bad character or propensity.

[7] The only basis for introducing evidence of Bernardo Rodriguez's conviction for a federal drug offense would be under section 90.404(1)(b)1, which permits the admission "of a pertinent trait of character of the victim of the crime offered by an accused." [3] Assuming, without deciding, that evidence of the conviction should have been admitted to support Espinosa's story that the murders were precipitated by an argument over transporting drugs, the error was harmless. Espinosa was allowed to present the testimony of the police officer who testified to the evidence linking Bernardo Rodriguez to the drug seizure at Maria Castellanos's house. Further, Bernardo's involvement in the drug trade was, at most, a peripheral issue with respect to whether Espinosa was guilty of murder.

[8] Espinosa raises several other claims relating to the guilt phase of the trial. He claims the court should have granted his motion for costs to retain a professor of psychology to testify with respect to the reliability of eyewitness identification. We addressed that very issue in *Johnson v. State*, 438 So.2d 774, 777 (Fla.1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), where we concluded that "a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony." The trial judge did not abuse his discretion in refusing to authorize costs for the expert testimony.

[9] We also find no merit to Espinosa's claim that the serologist should not have been able to testify to the 1979 statistics on the demographics of blood types. The trial judge thoroughly considered the relevance of these statistics before he admitted them, and defense counsel was able to effectively cross-examine the serologist as to the statistics' reliability. Finally, the trial court did not abuse its discretion in refusing to give the jury a circumstantial-evidence instruction and a specific-intent instruction.

[10] Turning to the penalty phase of the trial, Espinosa first claims that he was denied the time and money necessary to present mitigating evidence by flying in several of Espinosa's family members from Central America to testify to a history of mental and physical child abuse. Counsel claims that he did not make the motion to bring them to the United States until the beginning of the penalty phase because Espinosa had been embarrassed to tell him about the abuse until the penalty phase was imminent. Espinosa also claims that the judge should have granted him a delay to obtain new counsel for the penalty phase of his trial. Espinosa wanted to be represented by an experienced death-penalty lawyer from Texas, and he informed his counsel of this desire at the end of the guilt phase.

Espinosa and his counsel were aware for several months that the state would seek the death penalty. On the first day of the trial, the trial judge informed Espinosa and his attorney that he would begin the penalty phase of the trial approximately two hours after the jury returned its verdicts. Espinosa's counsel agreed to the procedure. "The granting or denial of a motion for continuance is within the discretion of the trial court." *Williams v. State*, 438 So.2d 781, 785 (Fla.1983), *cert. denied*, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 146 (1984). The trial judge did not abuse his discretion. Any prejudice to Espinosa was a result of his own delay in preparing for the penalty phase of the trial.

[11, 12] Further, there was no abuse of discretion in not allowing one of Espinosa's former attorneys to testify that Espinosa was a kind, artistic person. The attorney was employed by the public defender's office which had been removed from this case

3. Section 90.610, Florida Statutes (1987), is inapplicable since that section applies to the use of criminal convictions to impeach witnesses.

because its attorneys had at one time represented both defendants. We conclude that it was not error to exclude the testimony in view of the fact the attorney was going to testify as to the character of a client based on her observations while representing him earlier in the same case and because Espinosa was allowed to present five other character witnesses on his behalf.[4] The trial judge also did not err in limiting Espinosa's testimony during the penalty phase since it was largely a disjointed narrative in which he continued to argue his innocence. Espinosa had already testified extensively during the guilt phase of the trial as to his version of the events that occurred on the night of the murders. *See Sireci v. State*, 399 So.2d 964 (Fla. 1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), *overruled on other grounds, Pope v. State*, 441 So.2d 1073 (Fla.1983).

[13–15] Espinosa next claims that the trial court should not have found the aggravating factor of a prior violent-felony conviction based on his conviction for Bernardo Rodriguez's murder. We reject this claim. *See Correll v. State*, 523 So.2d 562 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988). We also find that the trial court had sufficient evidence to find that Teresa's murder was committed to avoid arrest since she could identify the defendants and had pleaded with them to leave, promising not to call the police, and since the defendants attempted to stab Odanis to death after she had seen them in the kitchen. The attempted murder of Odanis can properly be considered in support of this aggravating factor since it was relevant to the defendants' intent during the same criminal episode.

[16] Espinosa also argues that the jury was improperly influenced by Odanis's attempted murder when they were considering the heinous, atrocious, or cruel aggravating factor. However, we find nothing in the jury instructions or elsewhere that indicates that the jury's deliberations with respect to whether Espinosa should be executed for Teresa's murder was improperly influenced by evidence concerning the attack on Odanis. The trial judge's finding that this aggravating factor applied was supported by the medical examiner's testimony that Teresa was alive while she was being strangled and repeatedly stabbed. We reject Espinosa's complaint with respect to the text of the jury instruction on the heinous, atrocious, or cruel aggravating factor upon the rationale of *Smalley v. State*, 546 So.2d 720 (Fla.1989).

Finally, we find that the jury instructions did not denigrate the jury's role in sentencing in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). *See Grossman v. State*, 525 So.2d 833 (Fla.1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). We summarily reject Espinosa's general claims as to the unconstitutionality of the death penalty. We also note that Espinosa incorporated any applicable claims made by Beltran-Lopez in his appeal and that we have considered and rejected those claims in *Beltran-Lopez v. State*, 583 So.2d 1030 (Fla. 1991). Therefore, we affirm Espinosa's convictions and sentences.[5]

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD and GRIMES, JJ., concur.

BARKETT, J., dissents with an opinion, in which KOGAN, J., concurs.

KOGAN, J., dissents with an opinion.

BARKETT, Justice, dissenting.

Because I believe a severance of the defendants' trials was mandated in this case, I dissent. Where defendants are presenting antagonistic defenses, I believe that severance should generally be the rule in

4. *See Muehleman v. State*, 503 So.2d 310 (Fla.), *cert. denied*, 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987).

5. At the oral sentencing proceeding, the trial judge erroneously sentenced Espinosa and Beltran-Lopez to a three-year statutory minimum for the life sentence for the attempted murder of Odanis. However, his written sentencing order correctly does not include a statutory minimum sentence on that count. *See Lopez v. State*, 470 So.2d 58 (Fla. 3d DCA 1985).

the guilt phase and should always be the rule in the penalty phase of a death case. Particularly in the penalty phase, which is premised on the principle of individualized punishment, extreme animosity between defendants detracts from the real issues in the case and creates too great a risk of unfair prejudice to the defendants to refuse severence merely for the sake of judicial economy.

While severance may not be mandated in every case involving antagonistic defenses, I agree with the court in *United States v. Berkowitz*, 662 F.2d 1127 (5th Cir. Unit B Dec.1981):

> [T]he defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant. In such a situation, the co-defendants do indeed become the government's best witnesses against each other. Where two defendants present defenses that are antagonistic at their core, a substantial possibility exists [] that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.[]

Id. at 1134. In this case, the defenses and aggressive tactics of Espinosa's codefendant and his lawyer clearly met this standard, thus elevating the antagonism to a level not permitted by principles of due process. *See* Art. I, § 9, Fla. Const. Even under the Court's view that, in general, antagonistic defenses need not always result in severance, *this* case goes too far.

In essence, Espinosa was fighting two adversaries as codefendant's counsel relieved the state of much of its burden of proving the state's case beyond a reasonable doubt. Codefendant's counsel went far beyond merely exculpating his client and blaming Espinosa for the crime.*

After first being cross-examined by the state, Espinosa was then vigorously cross-examined by Beltran-Lopez's counsel on all aspects of his testimony. At final argument, Beltran-Lopez's counsel again attacked Espinosa and made the state's case for it. A review of the record reveals more than mere general antagonism among codefendants. I would reverse and sever the trials in this case.

KOGAN, J., concurs.

KOGAN, Justice, dissenting.

I would recede from the pertinent holding of *McCray v. State*, 416 So.2d 804, 806-07 (Fla.1982), because I believe a strong possibility always exists for jury confusion whenever the testimony of codefendants is inconsistent and antagonistic, as it was here. Such testimony invites jurors to compare one defendant against the others, thus choosing who is "most guilty."

The purpose of a criminal trial is not to gauge defendants against each other, but to gauge their alleged crimes against the requirements of the law. Sometimes this may mean that one or more defendants will receive a harsher penalty; at others it may be more lenient. The rule, in other words, is two-edged. It is necessary, I believe, to ensure that jurors minds are focused on the merits of the guilt or innocence of the accused, not on the antagonism disclosed in two or more codefendants' testimony.

Accordingly, I would reverse the conviction and sentence and order new trials in which the cases of Espinosa and Beltran-Lopez are severed.

* For example, codefendant's counsel at opening statement told the jury:

> Mr. Espinosa goes in, takes this woman, gets on top of her and stabs her, stabs her . . . she had a gash right here on her belly that [the lead investigator] could actually see her spine from there.

Twondy Gail HENDERSON, Petitioner,

v.

STATE of Florida, Respondent.

No. 77252.

Supreme Court of Florida

July 11, 1991.

Defendant was convicted of theft and uttering forged instrument by the Circuit Court, Dade County, Gisela Cardonne, J. Defendant appealed. The District Court of Appeal, 572 So.2d 972, affirmed in part, reversed in part, remanded, and certified conflict. The Supreme Court, Barkett, J., held that convictions and sentences for theft and uttering forged instrument were permissible, even though both offenses arose from single transaction, since act of obtaining funds was separate act from act of uttering forged instrument.

So ordered.

Criminal Law ⇐29.10(1)

Convictions and sentences for uttering forged instrument and for theft of funds obtained by means of same forged instrument were permissible, considering that act of obtaining funds was separate act from act of uttering forged instrument.

Bennett H. Brummer, Public Defender, and Kosta S. Papanikas, Asst. Public Defender, Miami, for petitioner.

Robert A. Butterworth, Atty. Gen., and Joan L. Greenberg, Asst. Atty. Gen., Miami, for respondent.

KARNAVAS, Justice.

We have for review *Henderson v. State*, [illegible] (Fla. 4th DCA 1990), in which [illegible] expressly and [illegible] with *State v. Black*, [illegible] (Fla. 4th DCA 1989).

[illegible] to article V [illegible] Constitution.

The issue presented in this case is whether, pursuant to the principles enunciated in *Carawan v. State*, 515 So.2d 161 (Fla. 1987), a defendant may be convicted and sentenced for theft and uttering a forged instrument when both offenses arise from a single transaction and the defendant actually receives the property of another. The district court in *Henderson* did a thorough analysis of the issue and concluded that the convictions were properly imposed for separate acts under the facts in this case, consistent with *Carawan*. We approve the district court's conclusion and adopt its rationale as our own.[1] For the reasons expressed in *Henderson*, we disapprove *Suarez*.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, GRIMES, KOGAN and HARDING, JJ., concur.

Mauricio BELTRAN-LOPEZ, Appellant,

v.

STATE of Florida, Appellee.

No. 73437.

Supreme Court of Florida

July 11, 1991.

Defendant was convicted in the Circuit Court for Dade County, Arthur I. Snyder, J., of first-degree murder, second-degree murder, attempted murder, grand theft, and burglary, and defendant appealed. The Supreme Court held that (1) defendant was not prejudiced by his absence from several pretrial motion conferences; (2) defense counsel's absence from portion of charging conference was not prejudicial

2. We do not comment on any other issue discussed by the district court.

to defendant; and (3) death sentence was proper.

Affirmed.

Barkett, J., dissented and filed opinion in which Kogan, J., concurred.

Kogan, J., dissented and filed opinion.

1. Criminal Law ⇐1166.14

Defendant was not prejudiced by his absence from several pretrial motion conferences since defendant could not have assisted counsel in arguing motions.

2. Criminal Law ⇐641.13(2)

Defense counsel's absence from portion of charging conference was not prejudicial to defendant; although counsel was absent during discussion of aggravating factor instruction, he was fully informed of matters discussed in his absence, allowed to adopt codefendant's arguments, and to offer any additional arguments of his own.

3. Homicide ⇐357(8)

Evidence that murder victim had seen defendant for several minutes and defendant sought out and stabbed attempted murder victim simply because she had seen him commit crime supported existence of aggravating factor in capital murder case that defendant committed murder to prevent lawful arrest.

4. Homicide ⇐357(4, 12)

In capital murder case, trial court properly rejected statutory mitigating factors of acting as accomplice and under duress or domination of another, finding instead that evidence established to exclusion of every reasonable doubt that defendant participated in the killings.

Nancy C. Wear, Coral Gables, for appellant.

Robert A. Butterworth, Atty. Gen. and Michael J. Neimand, Asst. Atty. Gen., Miami, for appellee.

1. The jury recommended the death penalty for Espinosa by an eleven-to-one vote, and he, too, was sentenced to death.

PER CURIAM.

Mauricio Beltran-Lopez appeals to this Court to review his conviction and sentence of death for the first-degree murder of Teresa Rodriguez. Beltran-Lopez additionally appeals his convictions for the second-degree murder of Bernardo Rodriguez, the attempted murder of Odanis Rodriguez, grand theft, and burglary. We have jurisdiction pursuant to article V, section 3(b)(1), of the Florida Constitution.

The facts of this case are set forth in *Espinosa v. State*, No. 72,436, — So.2d — (Fla. July 11, 1991).

The jury recommended by an eight-to-four vote that Beltran-Lopez be sentenced to death.[1] The judge then sentenced Beltran-Lopez to death, finding in aggravation that (1) he previously had been convicted of a violent felony; (2) the murder was committed to prevent lawful arrest; (3) the murder was committed during armed burglary; and (4) the murder was especially heinous, atrocious, or cruel.[2] The judge found statutory mitigation of no significant criminal history and nonstatutory mitigation that Beltran-Lopez was a good son. Beltran-Lopez was additionally sentenced to life with a statutory three-year minimum for the second-degree murder, life for the attempted murder, five years for grand theft, and life with a three-year minimum for the armed burglary.

Beltran-Lopez's first claim is that the trial court should have severed his trial from Espinosa's. We have already rejected this claim in *Espinosa*. In that case, we noted that *McCray v. State*, 416 So.2d 804 (Fla.1982), states that severance is not required simply because codefendants blame each other for the crime. *Espinosa*, — So.2d at — — —. The key is that each defendant has the opportunity to cross-examine the other if the other chooses to testify. *Id.* We then further stated:

> Under this standard, Espinosa and Beltran-Lopez were clearly not entitled to separate trials. The fact that Espinosa testified at trial and was subject to exam-

2. § 921.141(5)(b), (d), (e), (h), Fla.Stat. (1985).

> ination by Beltran-Lopez's attorney is not a sufficient reason to grant severance. Further, Espinosa was not prejudiced by an inability to cross-examine Beltran-Lopez during the guilt phase since Beltran-Lopez did not testify and the state did not attempt to introduce Beltran-Lopez's confession. Beltran-Lopez did testify during the penalty phase, but Espinosa was able to cross-examine him. No evidence was introduced in this trial that could not have been introduced against either Espinosa or Beltran-Lopez if either had been tried alone. Therefore, we find that Espinosa and Beltran-Lopez were not entitled to a severance.

Id. at —. Beltran-Lopez also claims that the trials should have been severed to protect his right to a speedy trial. We do not find where this was asserted as a ground for granting a severance. In any event, Beltran-Lopez never pursued the speedy trial remedy provided under rule 3.191(i), Florida Rules of Criminal Procedure.

[1] Beltran-Lopez's next claim is that reversible error occurred because he was absent from several pretrial motion conferences. However, Beltran-Lopez was not prejudiced by his absence since these were motions he could not have assisted his counsel in arguing. *See Roberts v. State*, 510 So.2d 885 (Fla.1987), *cert. denied*, 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988).[3] Further, Beltran-Lopez has not carried the burden of showing he was absent during any part of the actual trial. *Id.*

Beltran-Lopez next claims that the trial court should have granted his motion for acquittal at the close of the evidence. However, the evidence was clearly more than sufficient to withstand a motion for acquittal.

[2] Beltran-Lopez's remaining claims pertain to the penalty phase of the trial. First, Beltran-Lopez claims that the death sentence should be vacated because his attorney was absent during part of a charging conference in which the trial judge, prosecutor, and Espinosa's counsel discussed whether a heinous, atrocious, or cruel aggravating factor instruction was still permissible after the United States Supreme Court's decision in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Beltran-Lopez was not prejudiced because when his counsel did arrive his counsel was informed of the matters that had been discussed and allowed to adopt Espinosa's arguments and offer any additional arguments of his own. Further, we reject Beltran-Lopez's complaint with respect to the text of the heinous, atrocious, or cruel instruction, and we find that the evidence supported the existence of this factor in this case. *See Espinosa*, — So.2d at —.

[3] We also reject Beltran-Lopez's claim that the judge should not have found that the murder was committed to prevent lawful arrest. In *Espinosa* we noted that Teresa could identify the defendants and had promised not to call the police if they would leave. *See id.* at —. Further, the defendants sought out Odanis and stabbed her simply because she had seen them. *Id.* Beltran-Lopez claims that this aggravating factor should not apply to him as it does to Espinosa because he did not know the victims and, thus, they were less likely to identify him. This claim is meritless because Teresa had seen Beltran-Lopez for several minutes. Even if she had not learned his name, her acquaintance with Espinosa was likely to lead to him if she were permitted to live.

[4] Beltran-Lopez's final claim is that the trial court erred in not instructing the jury on, and then failing to find, the statutory mitigating factors of acting as an accomplice and acting under the duress or domination of another. However, the trial judge clearly instructed the jury on these two mitigating factors. Further, the trial judge expressly considered and rejected these factors at sentencing, finding that

3. Because the public defender was ultimately replaced on this case due to conflict of interest, we do not rule on whether Beltran-Lopez would have otherwise been prejudiced by his absence during the hearing on the motion to have counsel removed for conflict of interest and to have the trial severed due to conflict of interest.

the evidence established to the exclusion of every reasonable doubt that Beltran-Lopez participated in the killings. We find no error in this conclusion. We also reject Beltran-Lopez's claim that the trial judge should have found Beltran-Lopez's testimony and statement to the police as non-statutory mitigation.

Finally, as we did in *Espinosa*, we considered and have rejected any applicable claims raised by Espinosa. Therefore, we affirm Beltran-Lopez's convictions and sentences.[4]

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD and GRIMES, JJ., concur.

BARKETT, J., dissents with an opinion, in which KOGAN, J., concurs.

KOGAN, J., dissents with an opinion.

BARKETT, Justice, dissenting.

Severance should have been granted. At the very least, an individualized sentencing procedure requires a separate penalty phase for each defendant.

KOGAN, J., concurs.

KOGAN, Justice, dissenting.

I dissent for the reasons stated in *Espinosa v. State*, — So.2d —— (Fla.1991) (Kogan, J., dissenting).

Parvin WRIGHT, Petitioner,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION, etc., Respondent.

No. 77251.

Supreme Court of Florida.

Aug. 15, 1991.

Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance.

Steven H. Rothstein, Robert A. Romagna, P.A., Miami, for petitioner.

James K. Clark and Frances F. Guasch, Barnett, Clark and Barnard, Miami, for respondent.

PER CURIAM.

We review *Wright v. General Motors Acceptance Corp.*, 570 So.2d 1130 (Fla. 3d DCA 1990), in which the Third District Court of Appeal certified its decision to be of great public importance. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

We have now answered the questions involved in this case in *Kraemer v. General Motors Acceptance Corp.*, 572 So.2d 1363 (Fla.1990); *Raynor v. de la Nuez*, 574 So.2d 1091 (Fla.1991); and *Abdala v. World Omni Leasing, Inc.*, 583 So.2d 330 (Fla.1991). Because it is in harmony with these cases, we approve the decision below.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

4. At the oral sentencing proceeding, the trial judge erroneously sentenced Espinosa and Beltran-Lopez to a three-year statutory minimum for the life sentence for the attempted murder of Odanis. However, his written sentencing order correctly does not include a statutory minimum sentence on that count. *See Lopez v. State*, 470 So.2d 58 (Fla.3d DCA 1985).

CASE NO. 91-7390

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

RECEIVED
MAR 30 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HENRY JOSE ESPINOSA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.
_____/

AFFIDAVIT OF FILING PURSUANT TO RULE 29

CAME AND APPEARED, BEFORE ME the undersigned authority, **MICHAEL J. NEIMAND**, Assistant Attorney General, who first being duly sworn, deposes and says:

That on March 25, 1992, he placed in the United States Mail with first class postage prepaid, twelve (12) copies of the Brief of Opposition to Petition for Writ of Certiorari, and said copies were duly and properly addressed to the Clerk of the United States Supreme Court. Further, he is duly authorized member of the Bar of this Honorable Court.

MICHAEL J. NEIMAND
Assistant Attorney General

STATE OF FLORIDA
COUNTY OF DADE

SWORN TO AND SUBSCRIBED TO, before me on this 24th day of March, 1992 at Miami, Dade County, Florida.

NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA
MY COMMISSION EXPIRES: 7/31/92
BONDED THRU GENERAL INSURANCE UNDERWRITERS

CASE NO. 91-7390

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

HENRY JOSE ESPINOSA,

Petitioner,

vs.

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MICHAEL J. NEIMAND
Assistant Attorney General

STATE OF FLORIDA
COUNTY OF DADE

SWORN TO AND SUBSCRIBED TO, before me on this 24th day of March, 1992 at Miami, Dade County, Florida.

NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA
MY COMMISSION EXPIRES: 7/31/92
BONDED THRU NOTARY PUBLIC UNDERWRITERS

SUPREME COURT OF THE UNITED STATES

HENRY JOSE ESPINOSA, PETITIONER *v.* FLORIDA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 91-7390. Decided June 29, 1992

PER CURIAM.

Under Florida law, after a defendant is found guilty of a capital felony, a separate sentencing proceeding is conducted to determine whether the sentence should be life imprisonment or death. Fla. Stat. § 921.141(1) (1991). At the close of a hearing at which the prosecution and the defense may present evidence and argument on favor of and against the death penalty, *ibid.*, the trial judge charges the jurors to consider "[w]hether sufficient aggravating circumstances exist," "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances," and "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." § 921.141(2). The verdict does not include specific findings of aggravating and mitigating circumstances, but states only the jury's sentencing recommendation. "Nothwithstanding the recommendation of a majority of the jury," the trial court itself must then "weig[h] the aggravating and mitigating circumstances" to determine finally whether the sentence will be life or death. § 921.141(3). If the trial court fixes punishment at death, the court must issue a written statement of the circumstances found and weighed. *Ibid.*

A Florida jury found petitioner Henry Jose Espinosa guilty of first-degree murder. At the close of the evidence in the penalty hearing, the trial court instructed the jury on aggravating factors. One of the instructions informed the

jury that it was entitled to find as an aggravating factor that the murder of which it had found Espinosa guilty was "especially wicked, evil, atrocious or cruel." See §921.-141(h). The jury recommended that the trial court impose death, and the court, finding four aggravating and two mitigating factors, did so. On appeal to the Supreme Court of Florida, petitioner argued that the "wicked, evil, atrocious or cruel" instruction was vague and therefore left the jury with insufficient guidance when to find the existence of the aggravating factor. The court rejected this argument and affirmed, saying: "We reject Espinosa's complaint with respect to the text of the jury instruction on the heinous, atrocious, or cruel aggravating factor upon the rationale of *Smalley* v. *State*, 546 So.2d 720 (Fla. 1989)." 589 So. 2d 887, 894 (1991).

Our cases establish that, in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment. See *Sochor* v. *Florida*, 504 U. S. ___, ___ (1992) (slip op., at 4); *Stringer* v. *Black*, 503 U. S. ___, ___ (1992) (slip op., at 6–7); *Parker* v. *Dugger*, 498 U. S. ___, ___ (1991) (slip op., at 11); *Clemons* v. *Mississippi*, 494 U. S. 738, 752 (1990). Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. See *Stringer*, *supra*, at ___. We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague. See *Shell* v. *Mississippi*, 498 U. S. ___ (1990); *Maynard* v. *Cartwright*, 486 U. S. 356 (1988); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980).

The State here does not argue that the "especially wicked, evil, atrocious or cruel" instruction given in this case was any less vague than the instructions we found lacking in *Shell*, *Cartwright* or *Godfrey*. Instead, echoing the State Supreme Court's reasoning in *Smalley* v. *State*, 546 So. 2d 720, 722 (Fla. 1989), the State argues that there was no need to instruct the jury with the specificity our cases have required where the jury was the final sentencing authority, because, in the Florida scheme, the jury is not "the sentencer" for Eighth Amendment purposes. This is true, the State argues, because the trial court is not bound by the jury's sentencing recommendation; rather, the court must independently determine which aggravating and mitigating circumstances exist, and, after weighing the circumstances, enter a sentence "[n]otwithstanding the recommendation of a majority of the jury," Fla. Stat. §921.141(3).

Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975), or death, see *Smith* v. *State*, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U. S. 971 (1988); *Grossman* v. *State*, 525 So. 2d 833, 839, n. 1 (Fla. 1988), cert. denied, 489 U. S. 1071–1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see *Mills* v. *Maryland*, 486 U. S. 367, 376–377 (1988), just as we must further presume that the trial court followed Florida law, cf. *Walton* v. *Arizona*, 497 U. S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. *Baldwin* v. *Alabama*, 472 U. S. 372, 382 (1985), and the result, therefore, was error.

We have often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital-sentencing authority. See *id.*, at 389;

SUPREME COURT OF THE UNITED STATES

HENRY JOSE ESPINOSA, PETITIONER *v.* FLORIDA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 91-7390. Decided June 29, 1992

JUSTICE SCALIA, dissenting.

For the reasons given in my opinion in *Sochor* v. *Florida*, 504 U. S. ___, ___ (1992) (slip op., at 1), I dissent from the Court's summary reversal of Espinosa's death sentence. Since the Florida courts found several constitutionally sound aggravating factors in this case, Espinosa's death sentence unquestionably comports with the "narrowing" requirement of *Furman* v. *Georgia*, 408 U. S. 238 (1972). Compliance with that requirement is the only special capital-sentencing procedure that the Eighth Amendment demands. See *Walton* v. *Arizona*, 497 U. S. 639, 669–673 (1990) (SCALIA, J., concurring in part and concurring in the judgment). I would deny the petition.